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# BULLETIN

OF THE  
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AND APPEALS

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## DIRECTORY

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# DOCKETS

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**15-09-BZ**

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**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.**

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# CALENDAR

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**FEBRUARY 24, 2009, 10:00 A.M.**

**NOTICE IS HEREBY GIVEN** of a public hearing, Tuesday morning, February 24, 2009, 10:00 A.M., at 40 Rector Street, 6<sup>th</sup> Floor, New York, N.Y. 10006, on the following matters:

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**SPECIAL ORDER CALENDAR**

**885-78-BZ**

APPLICANT – Kramer Levin Naftalis & Frankel LLP, for 120 West 25th Realty Company, LLC, owner.  
SUBJECT – Application November 25, 2008 – Amendment to a previously granted Variance (§72-21) to allow the transfer of development rights from the subject site (Lot 53) to an adjoining site (Lot 49) in an M1-6 zoning district.  
PREMISES AFFECTED – 120 West 25<sup>th</sup> Street, south side of West 25<sup>th</sup> Street, between Sixth and Seventh Avenues, Block 800, Lot 53, Borough of Manhattan.  
**COMMUNITY BOARD #3M**

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**771-89-BZ**

APPLICANT – Mark D. Lipton, AIA, for William R. Burns, owner.  
SUBJECT – Application January 14, 2008 – Extension of Term/waiver of a previously granted Variance (§72-21) to allow the change of use from a single family dwelling to (UG6) office use with accessory parking in an R3-2 zoning district which expired on September 18, 2000.  
PREMISES AFFECTED – 2078 Richmond Avenue, west side of Richmond Avenue, 139.09’ south of Rivington Avenue, Block 2102, Lot 98, Borough of Staten Island.  
**COMMUNITY BOARD #2SI**

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**200-01-BZ**

APPLICANT – Davidoff Malito & Hutcher LLP by Ron J. Mandel, Esq., for Browne Associates, owner; Hillside Manor Rehabilitation and Extended Care Center, lessee.  
SUBJECT – Application January 29, 2009 – Extension of Time to complete construction and to obtain a Certificate of Occupancy for a previously granted Variance (§72-21) for the enlargement of an existing 11-story and penthouse rehabilitation/long term care facility (Hillside Manor), in an R6A/C2-4 Special Downtown Jamaica District zoning district, which expired on January 11, 2009.  
PREMISES AFFECTED – 182-15 Hillside Avenue, northeast corner of Hillside Avenue and Avon Street, Block 9950, Lot 1, Borough of Queens.  
**COMMUNITY BOARD #8Q**

**APPEALS CALENDAR**

**83-08-A**

APPLICANT – NYC Department of Buildings, for H. Patel, P.M. – Purvi Enterprises, LLC, owner.  
SUBJECT – Application April 9, 2008 – An appeal seeking to revoke Certificate of Occupancy No. 301279319 issued on January 17, 2007 as it was issued in error due to failure to comply with ZR §62-711 requiring waterfront certification. R5 SP Sheepshead Bay District.  
PREMISES AFFECTED – 3218 Emmons Avenue, Emmons Avenue between Bringham Street, and Bragg Street, Block 8815, Lot 590, Borough of Brooklyn.  
**COMMUNITY BOARD #15BK**

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**147-08-BZY**

APPLICANT – Hui-Li Xu, for Beachway Equities, Inc., owner.  
SUBJECT – Application May 23, 2008 – Extension of time (§11-331) to complete construction of a minor development commenced prior to the amendment of the zoning district regulations on April 30, 2008. R5 zoning district.  
PREMISES AFFECTED – 95-04 Allendale Street, between Atlantic Avenue and 97<sup>th</sup> Avenue, Block 10007, Lot 108, Borough of Queens.  
**COMMUNITY BOARD #12Q**

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**FEBRUARY 24, 2009, 1:30 P.M.**

**NOTICE IS HEREBY GIVEN** of a public hearing, Tuesday afternoon, February 24, 2009, at 1:30 P.M., at 40 Rector Street, 6<sup>th</sup> Floor, New York, N.Y. 10006, on the following matters:

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**ZONING CALENDAR**

**284-07-BZ**

APPLICANT – Ellen Hay, Wachtel & Masyr, LLP, for K.S. Realty, Inc., owner; AGT Crunch New York, LLC, lessee.  
SUBJECT – Application December 19, 2007 – Special Permit (§73-36) to allow the legalization of a Physical Culture Establishment (Crunch Fitness) on portions of the cellar, and first floor, second floor, and the third floor of a mixed-use building. The proposal is contrary to section 32-10. C6-1 district.  
PREMISES AFFECTED – 52-54 East 13<sup>th</sup> Street, south side of East 13<sup>th</sup> between Broadway and University Place, Block 564, Lot 11, Borough of Manhattan.  
**COMMUNITY BOARD #2M**

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# CALENDAR

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**188-08-BZ**

APPLICANT – Rizzo Group, for Hotel Carlyle Owners Corp., owners; The Hotel Carlyle, lessee.

SUBJECT – Application July 14, 2008 – Special Permit (§73-36) and Special Permit (§73-52) to allow the legalization of a Physical Culture Establishment and to extend this use into an R8B district for the subject hotel which exists in the C5-1MP and R8B zoning districts. The proposal is contrary to ZR §32-10.

PREMISES AFFECTED – 35 East 76<sup>th</sup> Street, (975-983 Madison Avenue; 981 Madison Avenue; 35-53 East 76<sup>th</sup> Street) northeast corner of Madison Avenue and East 76<sup>th</sup> Street, Block 1391, Lot 21, Borough of Manhattan.

**COMMUNITY BOARD #8M**  
-----**229-08-BZ**

APPLICANT – Sheldon Lobel, P.C. for Edward Haddad, owner.

SUBJECT – Application September 3, 2008 – Variance (§72-21) for the construction of a new single family home. This applications seeks to vary floor area (§23-141), less than the minimum side yards (§23-461) and the location of the required off street parking to the front yard (§25-62) in an R2X zoning district.

PREMISES AFFECTED – 866 East 8th Street, West side of East 8th Street, north of Avenue I, and adjacent to railroad, Block 6510, Lot 25, Borough of Brooklyn.

**COMMUNITY BOARD #12BK**  
-----**269-08-BZ**

APPLICANT – MetroPCS New York, LLC, for LGA Hotel LLC, owner; MetroPCS New York, LLC, lessee.

SUBJECT – Application November 5, 2008 – Special Permit (§73-30) to allow an extension to an existing non-accessory radio tower.

PREMISES AFFECTED – 90-10 Grand Central Parkway, north side of 23<sup>rd</sup> Avenue, between 90<sup>th</sup> Street and 93<sup>rd</sup> Street, Block 1068, Lot 1, Borough of Queens.

**COMMUNITY BOARD # 3Q**  
-----**303-08-BZ**

APPLICANT – Carl A. Sulfaro, Esq., for Luciano Calandra, owner; Lou-Cal Auto Service, Inc., lessee.

SUBJECT – Application December 10, 2008 – Special Permit filed pursuant to §11-411 of the zoning resolution to re-establish an expired variance which permitted the erection and maintenance of a gasoline service station with accessory uses (UG 16) C2-2/R5-B zoning district.

PREMISES AFFECTED – 34-67 Francis Lewis Boulevard, northeast corner of 35<sup>th</sup> Avenue, Block 6077, Lot 43, Borough of Queens.

**COMMUNITY BOARD # 11Q**  
-----**304-08-BZ**

APPLICANT – Bryan Cave LLP, for TDS Acquisition LLC d/b/a Trevor Day School, owner.

SUBJECT – Application December 11, 2008 – Variance (§72-21) and Special Permit (§73-19) to allow a school in a C8-4 district contrary to bulk regulations (33-123, 33-451, 33-453, 33-454, 33-26). C8-4 District.

PREMISES AFFECTED – 312-318 East 95<sup>th</sup> Street, south side of 95<sup>th</sup> Street, 215 east of Second Avenue, 350' feet west of First Avenue, Block 1557, Lot 41, Borough of Manhattan.

**COMMUNITY BOARD #8M**  
-----**319-08-BZ**

APPLICANT – Kramer Levin Naftalis & Frankel, LLP, for Lawrence and Melvin Friedland, owners; IFC Center, lessee.

SUBJECT – Application December 31, 2008 – Special Permit (§73-201) for an expansion of an existing motion picture theater (IFC Center). C1-5 District.

PREMISES AFFECTED – 323/25 and 327 6<sup>th</sup> Avenue; 14 Cornelia Street, 75' front of 6<sup>th</sup> Avenue and 54 frontage on Cornelia Street, Block 589, Lots 19, 30, 31, Borough of Manhattan.

**COMMUNITY BOARD #2M**  
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*Jeff Mulligan, Executive Director*

# MINUTES

**REGULAR MEETING  
TUESDAY MORNING, FEBRUARY 3, 2009  
10:00 A.M.**

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

**SPECIAL ORDER CALENDAR**

**239-97-BZ**

APPLICANT – Kenneth H. Koons, for B.W. Partners Incorporated, owner.

SUBJECT – Application September 3, 2008 – Extension of Term for a UG16 automotive service station and UG8 parking lot, in an R-6 zoning district, which expires on July 13, 2009.

PREMISES AFFECTED – 1499 Bruckner Boulevard, north west corner of Wheeler Avenue, Block 3712, Lot 1, Borough of Bronx.

**COMMUNITY BOARD #9BX**

APPEARANCES – None.

For Applicant: Rod Saunders.

**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 Montanez.....5  
Negative:.....0

**THE RESOLUTION:**

WHEREAS, this is an application for a reopening, an extension of term, and an amendment to legalize certain modifications to the previously approved site plan for a Use Group 16 automotive service station and a Use Group 8 parking lot; and

WHEREAS, a public hearing was held on this application on November 25, 2008, after due notice by publication in *The City Record*, with continued hearings on December 16, 2008, January 27, 2009, and then to decision on February 3, 2009; and

WHEREAS, the site and surrounding area had a site and neighborhood examination by Commissioner Hinkson; and

WHEREAS, Community Board 9, Bronx, recommends approval of the proposal; and

WHEREAS, the site is located on the northwest corner of Bruckner Boulevard and Wheeler Avenue, in an R6 zoning district; and

WHEREAS, the Board has exercised jurisdiction over the subject site since June 13, 1950, when, under BSA Cal. No. 37-50-BZ, the Board granted a variance permitting, in a residence use district, the reconstruction and extension of an accessory building to a gasoline service station to be used for a lubritorium, car wash and accessory store, and the parking and storage of motor vehicles on the unbuilt portion of the premises; and

WHEREAS, on June 29, 1954, under BSA Cal. No. 37-50-BZ, the Board amended the grant to permit the extension of the existing gasoline service station, to be used for the parking and storage of motor vehicles; and

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

WHEREAS, most recently, on July 13, 1999, under the subject calendar number, the Board approved an application under ZR §§ 11-411, 11-412, and 11-413, to permit the removal of gasoline service pumps and pressurized gas tanks, and the change in use from a gasoline service station (Use Group 16) to a service station (Use Group 16), for a term of ten years; and

WHEREAS, the applicant now seeks a ten-year extension of the term of the variance, which expires on July 13, 2009; and

WHEREAS, at hearing, the Board questioned whether the site conditions were in compliance with the BSA-approved plans; specifically, whether the signage complied and whether the southernmost curb cut on Wheeler Avenue had been removed; and

WHEREAS, in response, the applicant submitted revised signage calculations, revised drawings, and photographs indicating that the signage complies with the BSA-approved plans and that the southernmost curb cut on Wheeler Avenue was removed; and

WHEREAS, the applicant also seeks to amend the grant to eliminate the restriction on the hours of operation for the parking lot, which ran from 6:00 a.m. to 8:00 p.m. under the previous grant, to reflect that the spaces are now offered for rental on a monthly basis and are no longer available for transient parking; and

WHEREAS, based upon its review of the record, the Board finds that the requested extension of term is appropriate, as well as the elimination of the restriction on the hours of operation for the parking lot, 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 July 13, 1999, so that as amended this portion of the resolution shall read: “to extend the term for ten years from the expiration of the prior grant, to expire on July 13, 2019, and to eliminate any restriction on the hours of operation for the parking lot, *on condition* that any and all work shall substantially conform to drawings filed with this application marked “Received December 4, 2008”- (2) sheets; and *on further condition*:

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

THAT the term shall expire on July 13, 2019;

THAT the site be maintained free of debris and graffiti;

THAT the hours of operation for the automotive service station shall be limited to 8:00 a.m. through 8:00 p.m.;

THAT there shall be no limit on the hours of operation for the parking lot, and the spaces shall be offered for rental on a monthly basis;

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

THAT this approval is limited to the relief granted by the

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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. 210028860)

Adopted by the Board of Standards and Appeals, February 3, 2009.

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## 1228-79-BZ

APPLICANT – Harold Weinberg, P.E., for Mike Sedaghati, owner.

SUBJECT – Application December 5, 2008 – Extension of Term/waiver of a previously granted variance for the operation of a (UG6) retail store, in an R5 zoning district, which expired on July 21, 2005 and for an Extension of Time to obtain a Certificate of Occupancy which expired on May 21, 1997.

PREMISES AFFECTED – 2436 McDonald Avenue, between Avenue W and Village Road South, Block 7149, Lot 21, Borough of Brooklyn.

### COMMUNITY BOARD #15BK

APPEARANCES –

For Applicant: Harold Weinberg, Frank Sellitto.

THE VOTE TO CLOSE HEARING –

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

**ACTION OF THE BOARD** – Laid over to February 10, 2009, at 10 A.M., for decision, hearing closed.

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## 74-49-BZ

APPLICANT – Sheldon Lobel, P.C., for 515 Seventh Associates, owner.

SUBJECT – Application – Pursuant to (§ 11-411) of the Zoning Resolution to request an extension of the term of a variance previously granted allowing a parking garage located in an M1-6 zoning district. The application seeks an amendment to increase the number of parking spaces and a waiver of the BSA's Rules of Practice and Procedure for an extension of time to obtain a Certificate of Occupancy.

PREMISES AFFECTED – 515 Seventh Avenue, Southeast corner of the intersection of Seventh Avenue and West 38th Street, Block 813, Lot 64, Borough of Manhattan.

### COMMUNITY BOARD #5M

APPEARANCES –

For Applicant: Elizabeth Saphin and Calvin Wong.

For Opposition:

**ACTION OF THE BOARD** – Laid over to February 24, 2009, at 10 A.M., for continued hearing.

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## APPEALS CALENDAR

### 149-08-A

APPLICANT – Jack Lester, for Neighbors, et al, owner.  
SUBJECT – Application May 29, 2008 – Appeal seeking to revoke permits and approvals for a 30 story mixed use building that allow violations of the zoning regulations on open space, parking, curb cuts and proper use group classification. R7-2/C1-5 zoning district.  
PREMISES AFFECTED – 808 Columbus Avenue, 97<sup>th</sup> and 100<sup>th</sup> Street and Columbus Avenue, Block 1852, Lots 5, 15, 20, 23, 25, 31, Borough of Manhattan.

### COMMUNITY BOARD #7M

APPEARANCES –

For Applicant: Jack Lester.

**ACTION OF THE BOARD** – Appeal denied.

THE VOTE TO GRANT –

Affirmative: .....0

Negative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

THE RESOLUTION:1

WHEREAS, the instant appeal comes before the Board in response to a determination of the Manhattan Borough Commissioner, dated May 2, 2008, to uphold the approval of New Building Permit No. 104464438 permitting the construction of a 29-story mixed-use multiple dwelling located in an R7-2 zoning district with a C1-5 overlay on a multiple building zoning lot; and

WHEREAS, the Final Determination reads, in pertinent part:

“As discussed below, the issues in your letter regarding the permit’s compliance with zoning regulations of open space and use group classification do not present a cause to revoke the permit.

First, your letter questions whether the allocation of open space per residential building is consistent with the Zoning Resolution’s (ZR) § 12-10 definition of “open space” that describes such space, in part, as “accessible to and usable by all persons occupying a dwelling unit . . . on the zoning lot.” The approved plans indicate that occupants of each unit of a building will have access to an amount of open space that meets the open space ratio applied to the building in accordance with ZR Sections 23-14 and 23-142, and therefore the permit application properly demonstrates the required amount of open space. Contrary to your claim, the ZR does not specify that open space on a multiple building zoning lot must be shared spaced that is commonly accessible to all occupants of the zoning lot.

. . . Your letter [also] challenges the Use Group 6 classification of the retail store proposed in the

1 Headings are utilized only in the interests of clarity and organization.

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new building. Your letter alleges that this establishment is a Whole Foods market that offers services not limited to grocery sales, and that its size and associated traffic classify it as a Use Group 10 variety store prohibited in the C1-5 district. Whole Foods Markets have been properly classified under ZR § 32-15 Use Group 6 in other locations in the City as food stores. There is no authority in the ZR for the Department to consider store size and traffic impact as factors that determine inclusion in the use group;" and

WHEREAS, a public hearing was held on this appeal on October 28, 2008, after due notice by publication in the *City Record*, with continued hearings on November 18, 2008 and December 16, 2008, and then to decision on February 3, 2009; and

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

## PARTIES AND SUBMITTED TESTIMONY

WHEREAS, this appeal is brought by residents of the subject site and surrounding area (collectively, the "appellants"); and

WHEREAS, subject site is owned by 808 Columbus, LLC (the "owner"); and

WHEREAS, the appellants, the Department of Buildings ("DOB") and the owner have been represented by counsel throughout this proceeding; and

WHEREAS, the following elected officials provided testimony in support of this appeal Borough President Scott M. Stringer, Congressman Charles B. Rangel, and Assembly Member Daniel J. O'Donnell; and

WHEREAS, representatives of the Park West Village Tenants Association, the Coalition to Preserve Park West North, the Park West Neighborhood History Group, and other local residents provided written and oral testimony in support of this appeal; and

WHEREAS, several neighborhood residents provided written and oral testimony in opposition to this appeal; and

## THE SITE

WHEREAS, the subject site is located on a superblock (Block 1852) bounded by West 97<sup>th</sup> Street on the south, Columbus Avenue on the west, West 100<sup>th</sup> Street on the north, and Central Park West on the east; and

WHEREAS, the subject site is located on a Zoning Lot occupied by Park West Village, an existing housing development; and

WHEREAS, the Zoning Lot consists of Tax Lots 5, 20, 25, and 31; and

WHEREAS, the subject site is located on Columbus Avenue between West 97<sup>th</sup> Street and West 100<sup>th</sup> Street on Block 1852, Tax Lot 25; and

WHEREAS, the subject site is located in an R7-2 zoning

district with a C1-5 overlay on the Columbus Avenue frontage extending to a depth of 100 feet; and

WHEREAS, the subject site was formerly occupied by two one-story commercial buildings which have been demolished; and

WHEREAS, the subject site is proposed to be occupied with a 29-story mixed use commercial and residential building (the "proposed building"); and

WHEREAS, the cellar and subcellar of the proposed building are proposed to be occupied by a 324-car accessory parking garage, and a portion of the first floor and cellar are proposed to be occupied by a Use Group 6 supermarket; and

WHEREAS, the remainder of Zoning Lot, comprised of Tax Lots 5, 20, and 31 to the west of the subject site, is occupied by three 16-story residential buildings (the "existing buildings"); and

WHEREAS, the Park West Village development was constructed within the West Park Urban Renewal Area (the "Urban Renewal Area"), pursuant to a redevelopment plan for the area approved by the Board of Estimate on May 22, 1952 (the "Redevelopment Plan") in conjunction with the designation of the Urban Renewal Area; and

## PROCEDURAL HISTORY

WHEREAS, as discussed above, the instant appeal concerns the issuance by DOB of New Building Permit No. 104464438 permitting development of a 29-story mixed-use building at the subject site; and

WHEREAS, in connection with the approval of the Permit, the owner requested and received several zoning reconsiderations of the project by DOB, including a reconsideration which allowed the open space required on the Zoning Lot pursuant to ZR § 23-142 to be allocated among the proposed building and the three existing buildings on the Zoning Lot (the "DOB Reconsideration"); and

WHEREAS, in letters to DOB dated July 27, 2007 and February 7, 2008, the Manhattan Borough President argued that the reconsiderations granted for the proposed building were based on an erroneous interpretation of the applicable provisions of the Zoning Resolution; and

WHEREAS, on May 2, 2008, the Manhattan Borough Commissioner issued the Final Determination, cited above, that forms the basis of the instant appeal; and

WHEREAS, on May 29, 2008, the appellants filed the instant appeal at the BSA; and

## ISSUES PRESENTED

WHEREAS, the appellants contend that the proposed building violates open space requirements of the Zoning Resolution and the Redevelopment Plan, that the proposed supermarket is not permitted in the subject zoning district, and that its approval violates State and City environmental law, therefore, that the Permit should be revoked; and

WHEREAS, the appellants make the following primary arguments in support of their position that the Permit for the Proposed building should be revoked: (i) open space will not be usable and accessible to all residents of the Zoning Lot as required by the Zoning Resolution; (ii) the open space and height of the proposed building violates the Redevelopment Plan; (iii) the proposed supermarket is more appropriately

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2 Park West Village also includes a second superblock which is not implicated by the instant appeal.

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classified as a department store or a variety store; and (iv) a required review of the potential environmental impacts of the proposed supermarket was not undertaken; and

WHEREAS, these four arguments are addressed below; and

*Whether the Proposed Building Violates the Open Space Requirements of the Zoning Resolution*

WHEREAS, the appellants assert that the proposed building violates the open space requirements for the following reasons: (i) open space will not be usable and accessible to all residents of the Zoning Lot as required by the Zoning Resolution; (ii) the allocation of open space among the residential buildings of the Zoning Lot violates a DOB directive; (iii) the intent of the Zoning Resolution is to permit access by all residents of a Zoning Lot to all open space on that Zoning Lot; and (iv) the open space allocation deprives existing residents of an equitable share of open space; and

WHEREAS, the appellants contend that DOB failed to ensure that open space sufficient to support the proposed building's floor area that is accessible to all the occupants of the Zoning Lot is provided as required by ZR §§ 23-142 and 12-10 and, therefore, the Permit should be revoked; and

WHEREAS, the appellants further contend that because rooftop open space above a one-story portion of the proposed building will be reserved for the residents of that building, DOB failed to ensure that the open space on the subject site will be accessible to all residents of the existing buildings as required by ZR § 12-10; and

WHEREAS, DOB states that an allocation of open space required for each building on a Zoning Lot is consistent with the requirements of the Zoning Resolution because ZR § 12-10 defines "open space" as "accessible to and usable by all persons occupying a dwelling unit . . . on the zoning lot" and

WHEREAS, DOB further states that the definition of open space must be read in the context of the calculation of open space set forth in ZR §§ 23-14 and 23-142, which require a minimum amount of open space with respect to "any building" on a zoning lot, rather than to all buildings on a zoning lot; and

WHEREAS, ZR § 23-142 provides that the permissible floor area of a building is dependent on a calculation of the "height factor" of a development and the amount of open space provided on its zoning lot; and

WHEREAS, the Building is proposed to provide 1,023,125 sq. ft. of residential floor area, and will have a residential lot coverage of 67,422 sq. ft., with a resulting height factor of 15; and

WHEREAS, ZR § 23-142 imposes a minimum open space ratio of 22.5 for residential construction in an R7-2 zoning district with a height factor of 15; and

WHEREAS, the owner represents that the residential floor area on the Zoning Lot generates a requirement of 230,203 sq. ft. of open space, and that the zoning calculations indicated that a total of 240,331 square feet of open space will be provided on the Zoning Lot; and

WHEREAS, DOB contends that the Permit is valid because the application documents for the proposed building demonstrate the required amount of open space on the Zoning

Lot and compliance with the open space requirements of ZR §§ 23-142 and 12-10; and

WHEREAS, the DOB Reconsideration allows the required open space to be allocated among the four residential buildings on the Zoning Lot, with open space that will be located on the roof of the one-story commercial portion of the proposed building to be dedicated to the residents of that building; and

WHEREAS, DOB further contends that ZR §§ 23-14 and 23-142 require open space with respect to a building, rather than to the zoning lot as a whole, and therefore were satisfied by the Permit application which provides the required amount of open space to each building on the Zoning Lot; and

WHEREAS, the owner states that residents of the existing buildings will have access to other open space at grade level that satisfies the applicable open space requirements of the Zoning Resolution; and

WHEREAS, the owner further states that the current open space at grade will be improved and that a significant amount of open space previously occupied by accessory parking will be landscaped; and

WHEREAS, DOB further states that the ZR § 12-10 definition of "open space" does not specify that open space on a multiple building dwelling lot must be common, centralized space that is shared by all occupants of the zoning lot; and

WHEREAS, the owner argues that neither ZR §§ 12-10, 23-14, nor any other provision of the Zoning Resolution, expressly concerns a condition involving multiple buildings on a zoning lot, nor requires that open space on a multi-building zoning lot be shared space that is commonly accessible to all the occupants of a zoning lot; and

WHEREAS, the owner contends that because the applicable open space requirements are expressed with reference to a single building, open space can therefore be allocated among buildings; and

WHEREAS, the owner points out that ZR § 23-14 states that "for any building on a zoning lot, the minimum required open space or open space ratio shall not be less than set forth in this Section . . ." and ZR § 23-142 likewise provides that "in the districts indicated, the minimum required open space ratio and the maximum floor area ratio for any building on a zoning lot shall be as set forth in the following table . . ."; and

WHEREAS, the owner further contends that there is no provision in the Zoning Resolution explicitly prohibiting an allocation of required open space among several buildings; and

WHEREAS, the appellants further argue that their contention that all open space on the subject site must be open to all residents of the Zoning Lot is supported by a Directive of DOB's Director of Operations dated May 28, 1968 (the "1968 Directive"); and

WHEREAS, the 1968 Directive includes the statement that "[s]ubdivision(b) shall be interpreted to mean that all open space shall be accessible to and usable by all the residents of the building or buildings;" and

WHEREAS, DOB argues that, rather than compelling the creation of common open space for occupants of all buildings on a multiple building zoning lot, the Directive allows the applicant to choose whether to allocate open space generated

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by each building to be accessible and usable only to the residents of that building or to be accessible to all residents of all the buildings; and

WHEREAS, DOB states that the Permit application indicates that the residents of each building will have access to an amount of open space that meets the open space ratio of ZR § 23-142 and therefore conforms to the 1968 Directive; and

WHEREAS, DOB states that there is no support for the appellant's claim that the only means of satisfying the requirement for open space on a multiple building zoning lot is to dedicate all open space to all buildings on the lot; and

WHEREAS, DOB further states that compliance with the statute is not undermined by limiting access and use of open space for the new building to its occupants; and

WHEREAS, the appellants contend that the intent of the Zoning Resolution was to permit access to all open space on a Zoning Lot to all residents of the Zoning Lot; and

WHEREAS, the owner argues that the goal of the open space provisions is to ensure that all persons residing on a zoning lot have access to a prescribed amount of open space, which is achieved when each building on a large zoning lot improved with multiple buildings is allocated at least as much accessible open space as would be required for that building if it were located on a separate zoning lot; and

WHEREAS, the Board notes that the purported intent of the Zoning Resolution is not clearly stated and that the Board is not permitted to construe the intent of the Zoning Resolution, but is limited to the "four corners" of the statute (see McKinney's N.Y. Consol L. Statutes § 94 (2008)); and

WHEREAS, the appellants contend that the open space allocation approved will produce and inequitable or disproportionate distribution of open space and that residents of the existing buildings will be thereby deprived of open space; and

WHEREAS, the Board notes that, as each of the existing buildings is allocated an amount of open space that is in excess of that which would be required under the Zoning Resolution if they were located on separate zoning lots, it cannot be seen how those residents would be deprived of an equitable share of open space by the proposed building; and

WHEREAS, the Board agrees that the open space proposed for the subject site does not violate the open space requirements of the Zoning Resolution; and

WHEREAS, the Board finds that the proposed open space complies with the requirements of ZR §§ 23-142 and 12-10; and

*Whether the Proposed Building Violates Open Space Requirements and Height Limitations of the Redevelopment Plan*

WHEREAS, as discussed above, the Park West Village development was constructed pursuant to the Redevelopment Plan initially approved by the City in 1952; and

WHEREAS, the appellants state that the development of Park West Village continues to be governed by the parameters set forth in the Redevelopment Plan; and

WHEREAS, the appellants contend that the most recently amended version of the Redevelopment Plan limits lot coverage by residential buildings to no more than 19 percent of

the Zoning Lot area and that the proposed building would reduce the amount of open space in violation of the Redevelopment Plan; and

WHEREAS, appellants further contend that the Redevelopment Plan limits the height of residential buildings to 150 feet or 20 stories; and

WHEREAS, the appellants further contend that DOB failed to assure that open space on the site and the proposed building height comply with the requirements of the Redevelopment Plan, and, therefore, the Permit should be revoked; and

WHEREAS, the Board notes that the appellants put forth no evidence concerning the square footage of open space allegedly required by the Redevelopment Plan, the open space presently existing on the Zoning Lot, or the open space projected after development of the proposed building, so that the Board is unable to confirm that the proposed building would result in less open space than is required by the Redevelopment Plan; and

WHEREAS, however, the owner states that the Redevelopment Plan is no longer in effect, so that terms therein concerning open space requirements or height limitations are inapplicable to the proposed building; and

WHEREAS, the owner further states that, pursuant to a 1952 redevelopment agreement executed by and between the designated developer of Park West Village and the City of New York (the "Redevelopment Agreement"), the Redevelopment Plan was to remain in effect for a period of forty years from the completion of the project; and

WHEREAS, the Redevelopment Agreement deemed the project completed on such date that the certificates of occupancy were issued for all the residential buildings provided for in the Redevelopment Plan; and

WHEREAS, a certificate of occupancy for the final building provided for in the Redevelopment Plan was issued on July 22, 1966, the owner states that the restrictions imposed by the Redevelopment Agreement therefore expired on July 22, 2006; and

WHEREAS, the expiration of the restrictions set forth in the Redevelopment Agreement was confirmed by the Department of Housing Preservation and Development ("HPD") in a later dated August 7, 2006 from a HPD Deputy Commissioner submitted into the record (the "August 7, 2006 HPD Letter"); and

WHEREAS, the Board notes that the August 7, 2006 HPD Letter confirms that a temporary certificate of occupancy was issued on July 22, 1966 for 765 Amsterdam Avenue, the last residential building of the development, and that the restriction period accordingly ended on July 22, 2006; and

WHEREAS, as the August 7, 2006 HPD Letter establishes that the Redevelopment Plan is no longer in effect, the Board finds that such Plan imposes no continuing legal requirements concerning open space or building height, as alleged by the appellants; and

WHEREAS, the Board further finds that the proposed building is therefore governed solely by the land use restrictions set forth in the Zoning Resolution, as well as the Building Code and other applicable laws and codes; and

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*Whether the Proposed Supermarket is a Permitted Use in the Zoning District*

WHEREAS, portions of the ground floor and cellar levels of the proposed building are proposed to be occupied by a Whole Foods supermarket with approximately 56,000 sq. ft. of floor area; and

WHEREAS, the proposed building is located in a zoning district with a C1-5 overlay, in which a Use Group 6 supermarket is a permitted use; and

WHEREAS, the appellants argue that the proposed food store was improperly classified as a Use Group 6 use and instead ought to have been classified either as a variety store, which is limited to 10,000 sq. ft. of floor area in a C1-5 district, or as a department store, which is a Use Group 10 use that is not allowed in a C1-5 district; and

WHEREAS, the appellants further argue that the introductory text of ZR § 32-15 provides that Use Group 6 consists primarily of retail stores that “provide for a wide variety of local consumer needs” and “have a small service area;” and

WHEREAS, the appellants contend that that the proposed Whole Foods store will draw customers from a wide geographic area and produce heavy pedestrian and vehicular traffic and the store, therefore, is not a Use Group 6 supermarket; and

WHEREAS, the appellants further contend that the location, size and delivery requirements of the proposed store are consistent with those of a department store and are inappropriate and incompatible with the surrounding residential community; and

WHEREAS, in support of this position, the appellants submitted an affidavit from an engineer (the “engineer’s affidavit”) stating that trucking activity at loading docks on West 97<sup>th</sup> Street will pose a safety risk to students of the public school located across the street and that a new north-south driveway running across the Zoning Lot from West 100<sup>th</sup> street to West 97<sup>th</sup> Street also raises significant traffic and safety issues which ought to have been evaluated before the Permit was approved; and

WHEREAS, the Board notes that DOB has classified Whole Foods as a supermarket under ZR § 32-15 which provides that Use Group 6(A) retail uses include “[f]ood stores, including supermarkets, grocery stores, meat markets or delicatessen stores;” and

WHEREAS, DOB states that Whole Foods stores in other City locations have all been classified under ZR § 32-15 as Use Group 6 food stores, and

WHEREAS, DOB states that since Whole Foods is a supermarket under ZR § 32-15 and is a permitted use under the zoning resolution in C1-5 districts, the agency had no authority to consider the store size and potential traffic impacts prior to issuance of the Permit (see Lighthouse Hill Civic Ass’n v. City of New York, 275 A.D.2d 322, 323 (2d Dep’t 2000); and

WHEREAS, the Board notes that Use Group 6(A) food stores, unlike Use Group 6(A) bakeries and variety stores, are not specifically restricted as to size; and

WHEREAS, the Board further notes that the appellants supplied no evidence to support the claim that the proposed

store is not a supermarket under the plain meaning of the text, nor was any evidence submitted supporting the claim that that the store is more appropriately categorized as a department or variety store; and

WHEREAS, the owner states that the Whole Foods supermarket is a permitted Use Group 6 use because the store will be devoted primarily to the sale of food and related items; and

WHEREAS, the owner further states that variety stores and department stores primarily offer an array of non-food items and DOB has not classified any type of food-oriented supermarket, regardless of its size, as a variety store or a department store; and

WHEREAS, the Manhattan Borough President testified that DOB recently classified a Costco store at 32-50 Vernon Boulevard, Queens as a Use Group 10 department store pursuant to ZR § 32-19 although Costco’s merchandise is primarily devoted to the sale of food and related items; and

WHEREAS, the Board notes that no evidence was provided demonstrating that the merchandise sold by Costco is analogous to that sold by Whole Foods; and

WHEREAS, the appellants argue that Whole Foods draws customers from a large service area and is therefore not a Use Group 6 use based on the introductory text of ZR § 32-15 describing Use Group 6 uses as retail stores or service establishments with a small service area; and

WHEREAS, the owner contends that the introductory text of ZR § 32-15 is a general descriptive statement concerning Use Group 6 uses that is controlled by the specific list of uses subsequently enumerated, which as noted, includes supermarkets and other types of food stores; and

WHEREAS, the owner further contends that this interpretation is supported by ZR § 32-00, the introductory section of the commercial district regulations, which explains that the Use Groups listed in that section “including each use listed separately therein, are permitted in Commercial Districts as indicated in ZR §§ 32-11 to 32-25. . . .” and reflects a legislative judgment that an establishment that falls within one of the uses listed therein is a lawful and valid Use Group 6 use, regardless of its size, its actual service area or the amount of traffic that it generates; and

WHEREAS, the owner argues that such an interpretation of ZR § 32-15 is consistent with the principle of statutory construction that the particular shall control the general and with the rules for construing the Zoning Resolution (see ZR § 12-01; see also McKinney’s Consol. L. of NY, Statutes § 238 (2008)); and

WHEREAS, the owner contends that issues raised by the engineer’s affidavit are not relevant to the question of whether the proposed Whole Foods store is a valid Use Group 6 use that is permitted in the subject zoning district on an as-of-right basis; and

WHEREAS, notwithstanding the foregoing, the owner states that the loading docks on West 97<sup>th</sup> Street that will service the Whole Foods store are required under ZR § 36-62 and curb cuts providing access to these loading docks are permitted as-of-right; and

WHEREAS, because no approvals were required for the

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operation of the loading docks, the owner further states that DOB was not obligated to review the traffic or other impacts associated with the Whole Foods store prior to approving the Permit and, indeed, lacked the legal authority to do so (see Schum v. City of New York, 161 A.D. 519, 520 (1<sup>st</sup> Dep't 1990)); and

WHEREAS, the owner also submitted an affidavit from its Director of Construction ("director's affidavit") which states that as a result of extensive meetings with community residents, measures have been taken ensure that that vehicles servicing the Whole Foods store will operate safely with minimal neighborhood impacts; and

WHEREAS, the director's affidavit further states that the north-south driveway will not provide vehicular access to the Whole Foods store and instead is designed to provide access to vehicles picking up or dropping off passengers at the existing buildings and that the plans for the driveway have been reviewed and approved by DOB, the Fire Department and the Department of Transportation; and

WHEREAS, the Board finds that the proposed store is a Use Group 6 supermarket which is a permitted use in the subject C1-5 zoning district because: (i) the Zoning Resolution provides that Use Group 6 includes supermarkets without limitation as to size; (ii) DOB has consistently characterized Whole Foods supermarkets as supermarkets; and (iii) the applicant has proffered no evidence to support its characterization of the Whole Foods store as a variety store or department store; and

*Whether Environmental Review of the Proposed Building is Required*

WHEREAS, the appellants argue that an environmental review pursuant to the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR") provisions, which considered the projects' impact on neighborhood character, light and air, open space and traffic, was required before approval of the Permit; and

WHEREAS, the appellants further argue that the Permit should be revoked because an environmental review of the potential impacts of the proposed building was not undertaken prior to its issuance; and

WHEREAS, the owner contends that under the applicable open space and use provisions of the Zoning Resolution, the building may be constructed as of right and therefore the approval of the Permit was a ministerial act within the meaning of SEQRA and CEQR and no environmental review under these regulatory provisions was required; and

WHEREAS, SEQRA and/or CEQR review is required when a governmental agency undertakes, funds or approves a defined "action" that may have a significant impact on the environment (see Env. Cons. L. § 8-0109(2); see also 6 NYCRR § 617.1(c)) (2009); and

WHEREAS, an "action" under SEQRA includes projects that "require one or more new or modified approval from an agency or agencies" (see 6 NYCRR 617(b) (1) (2009)) and an "action" under CEQR is define to include "non-ministerial decisions on licensing activities; and

WHEREAS, an "approval" is a discretionary decision by an agency to issue a permit, certificate, license, lease or other

entitlement to or otherwise authorize a proposed project or activity" (see Env. Cons. L. § 8-0105) (2009));

WHEREAS, "official acts of a ministerial nature, involving no exercise of discretion," are expressly excluded from the definition of an approval (see ECL § 8-0105(5)(2009)); and

WHEREAS, the owner states that such ministerial acts include the issuance of building permits, when such issuance is "predicated solely on the applicant's compliance or noncompliance" with local building codes (see 6 NYCRR § 617.5(c) (19)(2009)); and

WHEREAS, the owner further states that, in numerous instances, the courts have held that DOB's issuance of as-of-right construction permits is not subject to CEQR, which implements SEQRA in new York City SEQRA and CEQR (see e.g., Lighthouse Hill Civic Ass'n v. City of New York, 275 A.D.2d 322, 323 (2d Dep't 2000); Schum v. City of New York, 161 A.D. 519, 520 (1<sup>st</sup> Dep't 1990), Citizens for Preservation of Windsor Terrace v. Smith, 122 A.D. 2d 827, 828 (2d Dep't 1986); and Herald Square South Civic Ass'n v. Consol. Edison Co. of New York, 2003 N.Y. Slip Op. 515755U (Sup. Ct. N.Y. Co. May 24, 2003), aff'd 307 A.D.2d 213 (1<sup>st</sup> Dep't 2003)); and

WHEREAS, the Board finds that environmental review pursuant to SEQRA and/or CEQR to consider the projects' impact on neighborhood character, light and air, open space and traffic was not required because approval of the Permit was a ministerial act within the meaning of SEQRA and CEQR; and

WHEREAS, the Board finds that the instant appeal presents no evidence that DOB violated any law or regulation; and

WHEREAS, accordingly, the Board concludes that the plans for construction of the proposed building under New Building Permit No. 104464438 meet the requirements for open space under ZR §§ 23-142 and 12-10, that the proposed supermarket is a permitted use within the subject zoning district and, because the Proposed building was therefore permitted as of right, no environmental review of the Proposed building's impacts was required; and

Therefore it is Resolved, that the instant appeal, seeking a reversal of the determination of the Manhattan Borough Commissioner, dated May 2, 2008, to uphold the approval of New Building Permit No. 104464438, and the revocation of said Permit, is hereby denied.

Adopted by the Board of Standards and Appeals, February 3, 2009.

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## 153-08-A

APPLICANT – Philip L. Rampulla, for Richard Salomone, owner.

SUBJECT – Application May 30, 2008 – Proposed construction not fronting on a legally mapped street contrary to General City Law Section 36. R1-2 Zoning District  
PREMISES AFFECTED – 156 Forest Road, northwest of Dalemere Road, Block 869, Lot 50 (Tent. 54,52), Borough of Staten Island.

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## COMMUNITY BOARD #2SI

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 Montanez.....5

Negative:.....0

**THE RESOLUTION:**

WHEREAS, the decision of the Staten Island Borough Commissioner, dated May 15, 2008, acting on Department of Buildings Application No. 510034589, reads in pertinent part:

“GCL 36 – The street giving access to the proposed construction of a new residential building Use Group 1 in R1-2 zoning district is not duly placed on the official map of the City of New York and therefore is referred to the Board of Standards and Appeals for approval;” and

WHEREAS, a public hearing was held on this application on January 27, 2009, after due notice by publication in the *City Record*, and then to decision on February 3, 2009; and

WHEREAS, by letter dated December 9, 2008, the Fire Department states that it has reviewed the subject proposal and has no objections; and

WHEREAS, in order to obtain FDNY approval, the applicant agreed to make changes to the roadbed and sidewalk that require approval of a Builder’s Pavement Plan by the Department of Transportation (“DOT”); and

WHEREAS, the site is within the Special Natural Area District (NA-1), the Board notes that a certification is required from the City Planning Commission pursuant to ZR § 105-40 prior to the issuance of a permit by the Department of Buildings (“DOB”); and

WHEREAS, the applicant represents that it will seek such certification; and

WHEREAS, accordingly, the Board has determined that the applicant has submitted adequate evidence to warrant this approval under certain conditions.

*Therefore it is Resolved* that the decision of the Staten Island Borough Commissioner, dated May 15, 2008, acting on Department of Buildings Application No. 510034570, is modified by the power vested in the Board by Section 36 of the General City Law, and that this appeal is granted, limited to the decision noted above; *on condition* that construction shall substantially conform to the drawings filed with the application marked “Received January 6, 2009 ” – (1) sheet; that the proposal shall comply with all applicable zoning district requirements; and that all other applicable laws, rules, and regulations shall be complied with, and *on further condition:*

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 DOB shall review the proposed plans to ensure compliance with all relevant provisions of the Zoning Resolution;

THAT a Builder’s Pavement Plan shall be filed and

approved by DOT prior to the issuance of any permits by DOB;

THAT the City Planning Commission shall certify the proposed development pursuant to ZR § 105-40 prior to the issuance of a permit by DOB;

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, February 3, 2009.

## 154-08-A

APPLICANT – Philip L. Rampulla, for Richard Salomone, owner.

SUBJECT – Application May 30, 2008 – Proposed construction not fronting on a legally mapped street contrary to General City Law Section 36. R1-2 Zoning District PREMISES AFFECTED – 150 Forest Road, northwest of Dalemere Road, Block 869, Lot 63 (Tent. 54,52), Borough of Staten Island.

## COMMUNITY BOARD #2SI

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 Montanez.....5

Negative:.....0

**THE RESOLUTION:**

WHEREAS, the decision of the Staten Island Borough Commissioner, dated May 15, 2008, acting on Department of Buildings Application No. 510034570, reads in pertinent part:

“GCL 36 – The street giving access to the proposed construction of a new residential building Use Group 1 in R1-2 zoning district is not duly placed on the official map of the City of New York and therefore is referred to the Board of Standards and Appeals for approval;” and

WHEREAS, a public hearing was held on this application on January 27, 2009, after due notice by publication in the *City Record*, and then to decision on February 3, 2009; and

WHEREAS, by letter dated December 9, 2008, the Fire Department states that it has reviewed the subject proposal and has no objections; and

WHEREAS, in order to obtain FDNY approval, the applicant agreed to make changes to the roadbed and sidewalk that require approval of a Builder’s Pavement Plan by the Department of Transportation (“DOT”); and

WHEREAS, the site is within the Special Natural Area District (NA-1), the Board notes that a certification is required from the City Planning Commission pursuant to ZR § 105-40

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prior to the issuance of a permit by the Department of Buildings (“DOB”); and

WHEREAS, the applicant represents that it will seek such certification; and

WHEREAS, accordingly, the Board has determined that the applicant has submitted adequate evidence to warrant this approval under certain conditions.

*Therefore it is Resolved* that the decision of the Staten Island Borough Commissioner, dated May 15, 2008, acting on Department of Buildings Application No. 510034570, is modified by the power vested in the Board by Section 36 of the General City Law, and that this appeal is granted, limited to the decision noted above; *on condition* that construction shall substantially conform to the drawings filed with the application marked “Received January 6, 2009” – (1) sheet; that the proposal shall comply with all applicable zoning district requirements; and that all other applicable laws, rules, and regulations shall be complied with, and *on further condition*:

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 DOB shall review the proposed plans to ensure compliance with all relevant provisions of the Zoning Resolution;

THAT a Builder’s Pavement Plan shall be filed and approved by DOT prior to the issuance of any permits by DOB;

THAT the City Planning Commission shall certify the proposed development pursuant to ZR § 105-40 prior to the issuance of a permit by DOB;

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, February 3, 2009.

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## 263-08-BZY

APPLICANT – Slater & Beckerman, LLP, for Wilshire Hospitality, LLC, owner.

SUBJECT – Application October 24, 2008 – Extension of time to complete construction (§11-331) of a minor development commenced prior to the amendment of the zoning district regulations. R7B/C1-3.

An appeal seeking a determination that the owner of said premises has acquired a common law vested right to continue development commenced under the prior R7-1/C1-2 Zoning District.

PREMISES AFFECTED – 29-23 40<sup>th</sup> Road, Block 402, Lots 12 & 35, Borough of Queens.

## COMMUNITY BOARD #1Q

APPEARANCES –

For Applicant: Neil Weisbard.

**ACTION OF THE BOARD** – Application withdrawn.

## THE VOTE TO WITHDRAW –

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

Negative:.....0

Adopted by the Board of Standards and Appeals, February 3, 2009.

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## 264-08-A

APPLICANT – Slater & Beckerman, LLP, for Wilshire Hospitality, LLC, owner.

SUBJECT – Application October 24, 2008 – Extension of time to complete construction (§11-331) of a minor development commenced prior to the amendment of the zoning district regulations. R7B/C1-3.

An appeal seeking a determination that the owner of said premises has acquired a common law vested right to continue development commenced under the prior R7-1/C1-2 Zoning District.

PREMISES AFFECTED –30-02 40<sup>th</sup> Avenue, Block 402, Lots 12 & 35, Borough of Queens.

## COMMUNITY BOARD #1Q

APPEARANCES –

For Applicant: Neil Weisbard.

**ACTION OF THE BOARD** – Appeal granted.

## THE VOTE TO GRANT –

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

Negative:.....0

## THE RESOLUTION:

WHEREAS, this is an appeal requesting a Board determination that the owner of the premises has obtained the right to complete construction of a proposed development of a 14-story hotel under the common law doctrine of vested rights; and

WHEREAS, this application was heard concurrently with a companion application under BSA Cal. No. 263-08-BZY, withdrawn prior to the date of decision, which was a request for a finding that the owner of the site had obtained a vested right to continue construction under ZR § 11-331; and

WHEREAS, a public hearing was held on this application December 16, 2008, after due notice by publication in *The City Record*, with a continued hearing on January 13, 2009, and then to decision on February 3, 2009; and

WHEREAS, the site was inspected by Chair Srinivasan and Vice-Chair Collins; and

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

WHEREAS, the subject site is located on an irregular through lot bounded by 40<sup>th</sup> Road to the south, and 40<sup>th</sup> Avenue to the north, located between 29<sup>th</sup> Street and Northern Boulevard, within an M1-3/R7X zoning district; and

WHEREAS, the subject site has a frontage of 75 feet on 40<sup>th</sup> Road, and frontage of 25 feet on 40<sup>th</sup> Avenue, and a total lot area of approximately 12,137 sq. ft.; and

WHEREAS, the site is proposed to be developed with a

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14-story hotel (the "Building"); and

WHEREAS, the Building is proposed to have a total floor area of approximately 60,446 sq. ft. (4.98 FAR); and

WHEREAS, the site was formerly located within an M1-3D zoning district; and

WHEREAS, on July 17, 2008, New Building Permit No. 410123021 (the "Permit") was issued by the Department of Buildings ("DOB") permitting construction of the Building, and work commenced on July 22, 2008; and

WHEREAS, on October 7, 2008, (hereinafter, the "Enactment Date"), the City Council voted to enact the Dutch Kills Rezoning, which changed the zoning district to M1-3/R7X; and

WHEREAS, the applicant represents that the Building complies with the former M1-3D zoning district parameters; specifically, the total building height of 142'-8" was permitted; and

WHEREAS, because the site is now within an M1-3/R7X zoning district, the Building would not comply with the maximum total building height of 125'-0"; and

WHEREAS, because the Building is not in compliance with these provisions of the M1-3/R7X zoning district and work on the foundation was not completed as of the Enactment Date, the Permit lapsed by operation of law; and

WHEREAS, additionally, DOB issued a Stop Work Order on October 8, 2008 halting work on the Building; and

WHEREAS, it is from this order that the applicant appeals; and

WHEREAS, the applicant requests that the Board find that based upon the amount of financial expenditures, including irrevocable commitments, and the amount of work completed, the owner has a vested right to continue construction and finish the proposed development; and

WHEREAS, as a threshold matter in determining this appeal, the Board must find that the construction was conducted pursuant to a valid permit; and

WHEREAS, DOB initiated a special audit review of the Permit and issued a letter to the owner dated October 27, 2008 providing notice of its intent to revoke the Permit ("Notice of Intent") based on certain zoning and Building Code objections (the "Objections"); and

WHEREAS, on December 4, 2008, DOB rescinded the Notice of Intent, based on the applicant's resolution of the Objections; and

WHEREAS, by letter dated December 9, 2008, DOB stated that the Permit was lawfully issued on July 17, 2008, authorizing construction of the proposed Building prior to the Enactment Date; and

WHEREAS, the Permit lapsed by operation of law on the Enactment Date because the plans did not comply with the new M1-3/R7X zoning district regulations and DOB determined that the Building's foundation was not complete; and

WHEREAS, thus, the Board finds that the Permit was validly issued by DOB to the owner of the subject premises and was in effect until its lapse by operation of law on October 7, 2008; and

WHEREAS, the Board notes that when work proceeds under a valid permit, a common law vested right to continue

construction generally exists where: (1) the owner has undertaken substantial construction; (2) the owner has made substantial expenditures; and (3) serious loss will result if the owner is denied the right to proceed under the prior zoning; and

WHEREAS, Putnam Armonk, Inc. v. Town of Southeast, 52 A.D.2d 10, 15, 382 N.Y.S.2d 538, 541 (2d Dept. 1976) stands for the proposition that where a restrictive amendment to a zoning ordinance is enacted, the owner's rights under the prior ordinance are deemed vested "and will not be disturbed where enforcement [of new zoning requirements] would cause 'serious loss' to the owner," and "where substantial construction had been undertaken and substantial expenditures made prior to the effective date of the ordinance;" and

WHEREAS, however, notwithstanding this general framework, the court in Kadin v. Bennett, 163 A.D.2d 308 (2d Dept. 1990) found that "there is no fixed formula which measures the content of all the circumstances whereby a party is said to possess 'a vested right.' Rather, it is a term which sums up a determination that the facts of the case render it inequitable that the State impede the individual from taking certain action;" and

WHEREAS, as to substantial construction, the applicant initially stated that prior to the Enactment Date, the following work was completed: (1) 100 percent of the excavation; (2) 100 percent of the underpinning; (3) 100 percent of shoring, lagging and sheeting; and (4) installation of 68 piles of the required 138, constituting approximately 49 percent of the pilings; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: photographs of the site, accounting tables, invoices for labor and materials, and affidavits of the architect, construction manager and owner's representative; and

WHEREAS, at hearing, the Board asked the applicant to clarify whether the premises was fully excavated and to explain why there were two ramps within the excavated area of the site; and

WHEREAS, a response by the applicant states that the premises is fully excavated and that one ramp was constructed pursuant to the DOB Site Safety Plan and the second ramp, to the rear of the premises, was created to allow for the transport of materials to the rear driveway which is 14 feet above grade and is used for the storage of construction materials; and

WHEREAS, on September 2, 2008, DOB issued Violation No. 090208CEXNDCO1 for failure to maintain plans at the subject site (the "September 2, 2008 SWO") and ordered that work on the Building be stopped; and

WHEREAS, on September 2, 2008, DOB partially rescinded the September 2, 2008 SWO to permit piling work on "Exposure 4," and

WHEREAS, the December 4, 2008 letter from DOB states that on September 16, 2008, an inspector observed and photographed piling work that was not permitted by the partial rescission and urged that the illegally performed work not be considered by the Board, and

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WHEREAS, the applicant states that the unauthorized work was performed due to a misunderstanding as to the exposure considered by DOB to be Exposure 4; and

WHEREAS, the Board notes that any work performed after the September 2, 2008 SWO, other than that explicitly permitted by the partial rescission, cannot be considered for vesting purposes; accordingly, the Board asked for further clarification of the amount of construction performed pursuant to the Permit before the issuance of the September 2, 2008 SWO; and

WHEREAS, in response, the applicant submitted a table establishing that, prior to the issuance of the September 2, 2008 SWO, the following work was completed: 242 linear feet of shoring and lagging, 151 linear feet of underpinning; 390 linear feet of wooded forms for footings, and 26 of the 138 piles (including two piles on Exposure 4 permitted by the partial rescission of the SWO); and

WHEREAS, the Board concludes that given the size of the site, and based upon a comparison of the type and amount of work completed in the instant case with the type and amount of work found by New York State courts to support a positive vesting determination, a significant amount of work was performed at the site prior to the Enactment Date; and

WHEREAS, the Board has reviewed the representations as to the amount and type of work completed and the supporting documentation and agrees that it establishes that significant progress was made prior to the Enactment Date, and that said work was substantial enough to meet the guideposts established by case law; and

WHEREAS, as to expenditure, the Board notes that unlike an application for relief under ZR § 11-30 *et seq.*, soft costs and irrevocable financial commitments can be considered in an application under the common law; accordingly, these costs are appropriately included in the applicant's analysis; and

WHEREAS, the applicant stated that prior to the lapse of the Permit, the owner expended \$7.2 million, including hard and soft costs and irrevocable commitments for the entire project, out of the approximately \$17 million budgeted for the proposed development; and

WHEREAS, at hearing the Board noted that the budgeted expenditures included site acquisition costs of \$5,511,960 which, for the purposes of its analysis, the Board cannot consider and directed the applicant to revise its statement of substantial expenditures accordingly; and

WHEREAS, the applicant submitted a revised statement of substantial expenditures to exclude the land acquisition cost and now estimates the actual construction costs for the proposed construction, both soft and hard, at approximately \$11,488,040; and

WHEREAS, in relation to actual construction costs and related soft costs, the applicant specifically notes that the owner had paid \$1,251,606.60 for excavation, soil removal, shoring, underpinning, rebar, form work and piles prior to the Enactment Date; and

WHEREAS, as proof of the expenditures, the applicant has submitted invoices and cancelled checks; and

WHEREAS, the applicant states that the owner also

irrevocably owes an additional \$854,781.40 in connection with work performed at the site prior to the Enactment Date, which has not yet been paid; and

WHEREAS, the Board considers the expenditure of \$1,256,388 in actual costs and irrevocable commitments significant, both in and of itself for a project of this size, and when compared against the total development costs; and

WHEREAS, again, the Board's consideration is guided by the percentages of expenditure cited by New York courts considering how much expenditure is needed to vest rights under a prior zoning regime; and

WHEREAS, as to the serious loss finding, the applicant contends that in order to comply with the new zoning, the height of the building would have been reduced to 125'-0" from 142'-8", resulting in the loss of two stories; and

WHEREAS, the applicants states the loss of two stories if vesting were not permitted is significant; and

WHEREAS, the applicant states that the decrease in the permissible building height under the new zoning would result in the elimination of 24 hotel rooms, constituting approximately 16 percent of the hotel's rooms; and

WHEREAS, the applicant further states that, in order to realize a reasonable rate of return on the premises, the owner entered into a franchise agreement with Marriot International and that the elimination of 24 hotel rooms would jeopardize that franchise agreement; and

WHEREAS, the applicant further states that Marriot International would be unlikely to maintain the franchise agreement for a hotel with a reduced room count, given a rejection by the corporation of an earlier proposal for a 117-room hotel; and

WHEREAS, the applicant represents that Marriot International may also hold the owner in default of the franchise agreement if it were required to eliminate 24 rooms and the owner would then be liable for liquidated damages estimated at \$396,000, as well as other consequential legal costs; and

WHEREAS, the applicant states that the Marriot franchise is essential to ensuring the financial feasibility of the hotel because access to Marriot's global reservation system can allow it to achieve an average daily hotel rate of between \$150 and \$200 and an occupancy rate of 65 percent; and

WHEREAS, the applicant further states that the anticipated rate would drop to an average of approximately \$105 and the occupancy rate would decline to 50 percent without such a franchise agreement; and

WHEREAS, the applicant further states that, due to market conditions, there are no alternative franchises that can permit the applicant to achieve a reasonable rate of return; and

WHEREAS, at hearing, the Board asked the applicant to explain why the savings on franchise fees that would result from the independent operation of the proposed hotel did not offset the reduced revenue generated by the reduced number of rooms; and

WHEREAS, in response, the owner's Director of

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Operations testified that the Marriot name and the company's global reservation system ensures higher room and occupancy rates that generate a financial return far in excess of the expense of the franchise royalty and marketing fees; and

WHEREAS, the applicant further states that without the Marriot brand recognition, the applicant would incur fees which can approach 25 percent of the room rate, depending on the prominence of the listing, for the placement of its hotel on independent on-line reservation systems such as Orbitz or Expedia.com; and

WHEREAS, at hearing the Board asked whether it was possible to redesign the Building to comply with the M1-3/R7X bulk regulations while achieving the same number of hotel rooms; and

WHEREAS, in response, the applicant states that the hotel cannot be redesigned to accommodate the same number of rooms due to the combined effect of the height limitation of the M1-3/R7X district and the dimensional requirements of hotel rooms; and

WHEREAS, the applicant further states the second through 14<sup>th</sup> floors of the proposed hotel will each contain approximately 12 rooms per floor, and that each room has a width of 11'-6"; and

WHEREAS, the applicant represents that relocating the 24 hotel rooms to a 12 story complying building would reduce the width of each room to approximately 9'-8", which would be too narrow to accommodate the furniture required for a hotel room; and

WHEREAS, at hearing the Board also asked why a reduction of 24 hotel rooms would cause a financial loss when a submission by the applicant projected the occupancy of the Building at only 65 percent; and

WHEREAS, in response, the applicant states that the projected occupancy rate for the hotel represents an average occupancy rate for an entire year which contemplates a peak occupancy during high seasons and weekends of nearly 100 percent; and

WHEREAS, the applicant further represents that the loss of income from 24 rooms during these peak periods would be significant and would cause the applicant to suffer a serious financial loss; and

WHEREAS, a serious loss determination may be based in part upon a showing that certain of the expenditures could not be recouped if the development proceeded under the new zoning, but in the instant application, the determination is also grounded on the applicant's discussion of the diminution in income that would occur if the building height of the new zoning were imposed; and

WHEREAS, in sum, the Board has reviewed the representations as to the work performed, the expenditures made, and serious loss, and the supporting documentation for such representations, and agrees that the applicant has satisfactorily established that a vested right to complete construction of the Building had accrued to the owner of the premises as of the date the Permit lapsed by operation of law; and

WHEREAS, accordingly, based upon its consideration

of the arguments made by the applicant, as well as its consideration of the entire record, the Board finds that the owner has met the standard for vested rights under the common law and is entitled to the reinstatement of the Permit, and all other related permits necessary to complete construction; and

*Therefore it is Resolved* that this appeal made pursuant to the common law of vested rights requesting a reinstatement of New Building Permit No. 410123021, as well as all related permits for various work types, either already issued or necessary to complete construction and obtain a certificate of occupancy, is granted, and the Board hereby extends the time to complete the proposed development for two years from the date of this resolution, to expire on February 3, 2011.

Adopted by the Board of Standards and Appeals, February 3, 2009.

## 19-08-BZY

APPLICANT – Edward Lauria, P.E., for Nicholas Valentino, owner.

SUBJECT – Application January 18, 2008 – Extension of time to complete construction (§ 11-332) of a minor development commenced under the prior zoning district regulations. C4-1 SRD

PREMISES AFFECTED – 3871 Amboy Road, north side of Amboy Road, west of Greaves Avenue, Block 4633, Lot 294, Borough of Staten Island.

### COMMUNITY BOARD #3SI

APPEARANCES –

For Applicant: Edward Lauria.

THE VOTE TO CLOSE HEARING –

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

Negative:.....0

**ACTION OF THE BOARD** – Laid over to February 24, 2009, at 1:30 P.M., for decision, hearing closed.

## 305-08-A

APPLICANT – NYC Economic Development Corp.

OWNER: Department of Small Business Services

SUBJECT – Application December 12, 2008 – for a variance of flood plain regulations under Sec. G107 of Appendix G. of the NYC Building Code.

PREMISES AFFECTED – East River Waterfront Esplanade, East side of South Street, 24' south of Maiden Lane, Block 36, Lots 25 & 30, Borough of Manhattan.

### COMMUNITY BOARD #1M

APPEARANCES –

For Applicant: Michael E. Levine, CB1, Nicole Dooskin, EDC, Cliff McMillan, ARUP, Chad Burke Shop.

For Administration: James Colgate, Department of Buildings.

THE VOTE TO CLOSE HEARING –

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

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Commissioner Montanez.....5  
Negative:.....0  
**ACTION OF THE BOARD** – Laid over to March 3,  
2009, at 10 A.M., for decision, hearing closed.

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*Jeffrey Mulligan, Executive Director*

Adjourned: A.M.

**REGULAR MEETING**  
**TUESDAY AFTERNOON, FEBRUARY 3, 2009**  
**1:30 P.M.**

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

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## ZONING CALENDAR

### 61-08-BZ

#### CEQR #08-BSA-069K

APPLICANT – The Law Office of Fredrick A. Becker, for  
429-441 86<sup>th</sup> Street, LLC, owner; TSI Bay Ridge 86<sup>th</sup> Street,  
LLC dba New York Sports Club, lessee.

SUBJECT – Application March 25, 2008 – Special Permit  
 (§73-36) to allow the operation of a Physical Culture  
 Establishment on the second and third floors of an existing  
 building. The proposal is contrary to ZR §32-10. C4-2A  
 (BR) district.

PREMISES AFFECTED – 439 86<sup>th</sup> Street, north side of 86<sup>th</sup>  
 Street and east of 4<sup>th</sup> Avenue, Block 6035, Lot 64, Borough  
 of Brooklyn.

#### COMMUNITY BOARD #10BK

APPEARANCES –

For Applicant: Fredrick A. Becker.

**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 Montanez .....5

Negative:.....0

THE RESOLUTION:

WHEREAS, the decision of the Brooklyn Borough  
 Superintendent, dated August 28, 2008, acting on  
 Department of Buildings Application No. 302332964, reads  
 in pertinent part:

“Physical culture establishment in a C4-2 zoning  
 district is contrary to Zoning Resolution § 32-10  
 and therefore must be referred to the Board of  
 Standards and Appeals;” and

WHEREAS, this is an application under ZR §§ 73-36  
 and 73-03, to permit, on a site within a C4-2 zoning district,  
 the legalization of a physical culture establishment (PCE) on  
 the second and third floors of an existing three-story  
 commercial building, contrary to ZR § 32-10; and

WHEREAS, a public hearing was held on this  
 application on July 29, 2008 after due notice by publication  
 in *The City Record*, with continued hearings on September  
 9, 2008 and January 13, 2009 and then to decision on  
 February 3, 2009; and

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

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WHEREAS, Community Board 10, Brooklyn, recommends approval of this application; and

WHEREAS, the subject site is located on the north side of 86<sup>th</sup> Street, between 4<sup>th</sup> Avenue and 5<sup>th</sup> Avenue, in a C4-2 zoning district; and

WHEREAS, the site is occupied by a three-story commercial building; and

WHEREAS, the PCE will occupy 17,172 sq. ft. of floor area on the second and third floors of the existing building; and

WHEREAS, the PCE will be operated as “New York Sports Club;” and

WHEREAS, the applicant represents that the services at the PCE include facilities for classes, instruction and programs for physical improvement, body building, and aerobics; and

WHEREAS, the proposed hours of operation of the PCE are: Monday through Thursday, from 5:00 a.m. to 11:00 p.m.; Friday, from 5:00 a.m. to 9:00 p.m.; and Saturday and Sunday, from 7:00 a.m. to 9:00 p.m.; 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, at hearing, the adjoining neighbor testified that the PCE’s rooftop air conditioning units generate excessive noise; and

WHEREAS, the Board directed the applicant to work with the adjoining neighbor to address the noise issue; and

WHEREAS, in response, the applicant submitted letters indicating that noise tests will be conducted in the adjoining neighbor’s unit during the summer; and

WHEREAS, the Board notes that applicant submitted DOB permits for the air conditioning units; and

WHEREAS, the applicant represents that the air conditioning units will comply with New York City Noise Code requirements; and

WHEREAS, by letter dated April 28, 2008, the Fire Department (“FDNY”) states that it has reviewed the application and recommends that the existing sprinkler system be interconnected to the proposed Interior Fire Alarm System (IFA) and that the PCE local alarm be activated when any sprinkler in the building is triggered; and

WHEREAS, in response, the applicant states that it will comply with the FDNY recommendations; 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 Board notes that the PCE has been in operation since June 1, 2008, without a special permit; and

WHEREAS, accordingly, the Board has determined that the term of the grant shall be reduced for the period of time, between June 1, 2008 and the date of this grant, when the PCE operated without the special permit; 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. 08BSA069K, dated March 1, 2008; 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; and

*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 within a C4-2 zoning district, the legalization of a physical culture establishment on the second and third floors of an existing three-story commercial building, contrary to ZR § 32-10; *on condition* that all work shall substantially conform to drawings filed with this application marked “Received March 25, 2008”-Three (3) sheets; “Received July 23, 2008”-One (1) sheet; and “Received August 27, 2008”-One (1) sheet; and *on further condition*:

THAT the term of this grant shall expire on June 1, 2018;

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 a certificate of occupancy shall be obtained by February 3, 2010;

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THAT the rooftop mechanical units shall comply with the requirements of the New York City Noise Code;

THAT Local Law 58/87 compliance shall be as reviewed and approved by DOB;

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

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;

THAT substantial construction be completed in accordance with ZR § 73-70; 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, February 3, 2009.

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## 207-08-BZ

### CEQR #09-BSA-016Q

APPLICANT – Eric Palatnik, P.C., for Cheon Park, owner.  
SUBJECT – Application August 11, 2008 – Variance (§72-21) to permit the expansion on the first floor of an existing day care center. The proposal is contrary to ZR Section 24-34 (front yard), R4 district.

PREMISES AFFECTED – 40-69 94<sup>th</sup> Street, northern corner of the intersection formed by 41<sup>st</sup> Avenue and 94<sup>th</sup> Street, Block 1587, Lot 1, Borough of Queens.

### COMMUNITY BOARD #7Q

APPEARANCES –

For Applicant: Eric Palatnik.

**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 Montanez .....5

Negative:.....0

**THE RESOLUTION:**

WHEREAS, the decision of the Queens Borough Superintendent, dated August 5, 2008, acting on Department of Buildings Application No. 410049576, reads, in pertinent part:

“Proposed conversion of a portion of the first floor from UG 2 to UG 3 increases the degree of non-compliance of the front yard and is contrary to ZR Section 24-34 and therefore must be referred to the BSA;” and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site within an R4 zoning district, the extension of an existing preschool located on a portion of the cellar floor onto a portion of the first floor of a four-story mixed-use residential/community facility building, which is contrary to

ZR § 24-34; and

WHEREAS, a public hearing was held on this application on January 13, 2009, after due notice by publication in the *City Record*, and then to decision on February 3, 2009; and

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

WHEREAS, Community Board 7, Queens, recommends approval of the application; and

WHEREAS, this application is brought on behalf of Bilingual SEIT and Pre-school, Inc. (the “School”), a private bilingual preschool for developmentally and learning disabled children; and

WHEREAS, the applicant represents that the School is State-licensed, privately owned, and fully funded by the New York City Department of Education and the New York State Education Department; and

WHEREAS, the site is located on the northeast corner of 94<sup>th</sup> Street and 41<sup>st</sup> Avenue, within an R4 zoning district; and

WHEREAS, the site has a rectangular shape with 100 feet of frontage on 94<sup>th</sup> Street and a depth of 60 feet, and a total lot area of 6,000 sq. ft.; and

WHEREAS, the subject site is occupied by a four-story and cellar mixed-use residential/community facility building, with the School occupying 4,117 sq. ft. of floor area in the cellar, and residential uses occupying 19,520 sq. ft. of floor area on the first through fourth floors; and

WHEREAS, the School proposes to expand the existing Use Group 3 preschool to include 2,356 sq. ft. of floor area on the first floor of the building, for a total floor area of 6,473 sq. ft.; and

WHEREAS, the applicant represents that the School is a permitted use in the underlying district; however, the proposed expansion requires a bulk variance because it increases the degree of non-compliance with the front yard requirements; and

WHEREAS, the existing, legally non-complying building has the following parameter: no front yards (two front yards with minimum depths of 10’-0” each are required for a Use Group 2 residential use in the underlying R4 district); and

WHEREAS, the proposed expansion of the School onto the first floor of the subject building would increase the degree of non-compliance of the front yards (two front yards with minimum depths of 15’-0” each are required for Use Group 3 community facility use in the underlying R4 district); and

WHEREAS, the proposal provides for three additional classrooms on the first floor; and

WHEREAS, the applicant states that the school has a programmatic need to accommodate current enrollment while allowing for future growth; and

WHEREAS, the applicant further states that the educational program provided by the School includes speech, physical, and occupational therapy, counseling services for students with developmental and learning disabilities, and bilingual education in Spanish, Korean, and Chinese for students age three and four; and

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WHEREAS, in order to meet its programmatic need, the applicant seeks a variance pursuant to ZR § 72-21; and

WHEREAS, the applicant represents that the front yard waiver is necessary to provide the program space necessary to adequately serve its current enrollment of 73 students; and

WHEREAS, the applicant states that the School currently has only four substandard-sized classrooms, with floor areas ranging between 465 sq. ft. and 478 sq. ft., that are located in the cellar of the subject building; and

WHEREAS, by letter dated March 13, 2008, the New York City Department of Education determined that preschool students with disabilities to be served by the School's program are unable to be appropriately served by the currently approved preschool programs in New York City and its environs; and

WHEREAS, the applicant represents that currently over 300 children in the area have resorted to home education due to the lack of adequate classroom space; and

WHEREAS, by letter dated April 29, 2008, the New York State Education Department approved the School's request to expand its current programs for preschool students with disabilities; and

WHEREAS, the applicant states that the proposed expansion onto the first floor of the existing building will provide an additional 2,356 sq. ft. of floor area for the School and allow it to serve a projected increase in enrollment of 51 students; and

WHEREAS, the Board acknowledges that the School, as an educational institution, is entitled to significant deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application; and

WHEREAS, specifically, as held in Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986), an educational institution's application is to be permitted unless it can be shown to have an adverse effect upon the health, safety, or welfare of the community, and general concerns about traffic, and disruption of the residential character of a neighborhood are insufficient grounds for the denial of an application; and

WHEREAS, the Board finds that the School's programmatic needs are legitimate, and agrees that the proposed enlargement is necessary to address its needs, given the current limitations; and

WHEREAS, accordingly, based upon the above, the Board finds that the programmatic needs of the School create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

WHEREAS, since the School is not a non-profit educational institution, the finding set forth at ZR § 72-21(b) must be made in order to grant the variance requested in this application; and

WHEREAS, the applicant submitted a feasibility study which analyzed an "as-is" option under the existing, legally non-complying four-story residential building with a Use Group 3 community facility use in the cellar; and

WHEREAS, the feasibility study concluded that the "as-is" option would generate a negative rate of return because the pre-existing non-complying condition provides limited light and air to the first floor space to be occupied by the School,

while other units on the ground floor have light and air on two exposures; and

WHEREAS, based upon the above, the Board has determined that there is no reasonable possibility that development in strict conformance with zoning will provide a reasonable return; and

WHEREAS, the applicant represents that the variance, if granted, 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 notes that the proposed use is permitted in the subject zoning district; and

WHEREAS, the applicant states that the expansion of the School onto the first floor of the subject building will not change the envelope of the existing legally non-complying building; and

WHEREAS, the applicant provided a 400-foot radius diagram indicating that the bulk and height of the subject building is compatible with the bulk and height of the homes in the surrounding neighborhood, which have heights ranging between two and six stories; and

WHEREAS, the applicant further represents that the increased number of students at the school will not cause a significant traffic increase in the vicinity of the subject building due to the availability of street parking adjacent to the subject site; and

WHEREAS, the applicant notes that the proposal will provide an additional entrance for the School on the first floor, thereby reducing pedestrian traffic at the existing entrance which is shared with the residential tenants of the building; and

WHEREAS, the applicant further notes that there is a separate entrance to the cellar via a ramp located on the northern side of the building; and

WHEREAS, the applicant states that there will be no internal connection between the first floor and cellar because each floor will accommodate a different age group; and

WHEREAS, accordingly, 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 applicant states that the hardship was not self-created, and that no development that would meet the programmatic needs of the School could occur given the existing conditions; and

WHEREAS, accordingly, the Board finds that the hardship herein was not created by the owner or a predecessor in title; and

WHEREAS, the applicant represents that the requested front yard waiver is the minimum necessary to accommodate the School's current and projected programmatic needs; and

WHEREAS, the Board finds that the requested relief is the minimum necessary to allow the School to fulfill its programmatic needs; and

WHEREAS, therefore, the Board has determined that the

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evidence in the record supports the findings required to be made under ZR § 72-21; and

WHEREAS, the project is classified as a Unlisted action pursuant to Sections 617.2 of 6 NYCRR; 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. 09BSA016Q, dated December 2, 2008; 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, 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, with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, 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 § 72-21 and grants a variance to permit, on a site within an R4 zoning district, the expansion of an existing preschool (Use Group 3) onto the first floor of a four-story mixed-use residential/community facility building, which is contrary to ZR § 24-34, *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 December 8, 2008,"-(3) sheets; and *on further condition*:

THAT any change in the use, occupancy, or operator of the School requires review and approval by the Board;

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;

THAT construction shall proceed in accordance with ZR § 72-23; 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, February 3, 2009.

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## 177-07-BZ

APPLICANT – Maurice Dayan, owner.

SUBJECT – Application July 6, 2007 – Variance (§ 72-21) to construct a two story, two family residential building on a vacant corner lot. This application seeks to vary the front yard requirement on one street frontage (§ 23-45) in an R-5 zoning district.

PREMISES AFFECTED – 886 Glenmore Avenue, corner of Glenmore Avenue and Milford Street, Block 4208, Lot 17, Borough of Brooklyn.

## COMMUNITY BOARD #7BK

APPEARANCES – None.

**ACTION OF THE BOARD** – Laid over to March 3, 2009, at 1:30 P.M., for postponed hearing.

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## 45-08-BZ

APPLICANT – Rampulla Associates Architects, for 65 Androvette Street, LLC, owner.

SUBJECT – Application February 29, 2008 – Variance (§72-21) to construct a four-story, 108 unit age restricted residential building contrary to use regulations (§42-00, §107-49). M1-1 District / Special South Richmond Development District.

PREMISES AFFECTED – 55 Androvette Street, north side Androvette Street, corner of Manley Street, Block 7407, Lots 1, 80, 82, (Tent. 1), Borough of Staten Island.

## COMMUNITY BOARD #3SI

APPEARANCES –

For Applicant: Phil L. Rampulla, Rebecca Pytosh and Raymond Masucci.

For Opposition: Dennis D. Dell'Angelo.

**ACTION OF THE BOARD** – Laid over to March 3, 2009, at 1:30 P.M., for continued hearing.

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## 99-08-BZ

APPLICANT – Rothkrug, Rothkrug & Spector, LLP, for Cee Jay Real Estate Development Company, owner.

SUBJECT – Application April 21, 2008 – Variance (§72-21) to construct a three story with cellar single family home on an irregular triangular lot what does not meet the rear yard requirement (§23-47) in an R3-2 (SRD) zoning district.

PREMISES AFFECTED – 102 Drumgoole Road, South side of Drumgoole Road, 144.62 ft. west of the intersection of Drumgoole Road and Wainwright Avenue, Block 5613, Lot 221, Borough of Staten Island.

## COMMUNITY BOARD #3SI

APPEARANCES –

For Applicant: Adam Rothkrug

**ACTION OF THE BOARD** – Laid over to February 24, 2009, at 1:30 P.M., for continued hearing.

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## 134-08-BZ

APPLICANT – Eric Palatnik, P.C., for Asher Goldstein, owner.

SUBJECT – Application April 30, 2008 – Variance (§72-

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21) to construct a third floor to an existing two story, two family semi-detached residence partially located in an R-5 and M1-1 zoning district.

PREMISES AFFECTED – 34 Lawrence Avenue, Lawrence Avenue, 80' west of McDonald Avenue, Block 5441, Lot 17, Borough of Brooklyn.

## COMMUNITY BOARD #12BK

APPEARANCES –

For Applicant: Eric Palatnik and Menachem Schmekrer.

**ACTION OF THE BOARD** – Laid over to March 3, 2009, at 1:30 P.M., for continued hearing.

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## 169-08-BZ

APPLICANT – James Chin & Associates, LLC, for Jeffrey Bennett, owner.

SUBJECT – Application June 24, 2008 – Variance (§ 72-21) to allow the residential redevelopment of an existing five-story commercial building. Six residential floors and six (6) dwelling units are proposed; contrary to use regulations (§42-00 & § 111-104 (e)). M1-5 (TMU- Area B-2) district.

PREMISES AFFECTED – 46 Laight Street, north side of Laight Street, 25' of frontage on Laight Street, Block 220, Lot 35, Borough of Manhattan.

## COMMUNITY BOARD #1M

APPEARANCES –

For Applicant: Ivan Khoury and Alexaner Harrow, R.A.

For Opposition:

**ACTION OF THE BOARD** – Laid over to March 24, 2009, at 1:30 P.M., for continued hearing.

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## 173-08-BZ

APPLICANT – Rothkrug Rothkrug & Spector, LLP, for Royal One Real Estate, LLC, owner.

SUBJECT – Application July 1, 2008 – Variance (§ 72-21) to allow a new twelve (12) story hotel building containing ninety nine (99) hotel rooms; contrary to bulk regulations (§ 117-522). M1-5/R7-3 Special Long Island City Mixed Use District, Queens Plaza Subdistrict Area C.

PREMISES AFFECTED – 42-59 Crescent Street, northeast corner of the intersection of Crescent Street and 43<sup>rd</sup> Avenue, Block 430, Lots 37, 38, Borough of Queens.

## COMMUNITY BOARD #2Q

APPEARANCES –

For Applicant: Adam Rothkrug, Reuben Elberg, Joseph Rosario and William Whitacre.

**ACTION OF THE BOARD** – Laid over to March 17, 2009, at 1:30 P.M., for continued hearing.

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## 198-08-BZ

APPLICANT – Mitchell S. Ross, Esq., for Pamela Equities Corp., owner; New York Health & Racquet Club, lessees.

SUBJECT – Application July 24, 2008 – Special Permit (§73-36) to allow the proposed physical culture establishment in the subcellar, cellar, first, second, and the

second mezzanine floors in a 12-story and penthouse mixed-use building. The proposal is contrary to ZR §32-10. C6-4A district.

PREMISES AFFECTED – 268 Park Avenue South (aka 268-276 Park Avenue South) west side of Park Avenue South at East 21<sup>st</sup> Street, Block 850, Lot 39, Borough of Manhattan.

## COMMUNITY BOARD #5M

APPEARANCES –

For Applicant: Mitchell Ross.

THE VOTE TO CLOSE HEARING –

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

Negative:.....0

**ACTION OF THE BOARD** – Laid over to February 10, 2009, at 1:30 P.M., for decision, hearing closed.

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## 201-08-BZ

APPLICANT – Rothkrug, Rothkrug & Spector, LLP, for For Our Children, Inc., owner.

SUBJECT – Application August 1, 2008 – Variance (§72-21) to allow a one story warehouse/ commercial vehicle storage building (UG 16); contrary to use regulations (§22-00). R3X district.

PREMISES AFFECTED – 40-38 216<sup>th</sup> Street, between 215<sup>th</sup> Place and 216<sup>th</sup> Street, 200' south of 40<sup>th</sup> Avenue, Block 6290, Lot 70, Borough of Queens.

## COMMUNITY BOARD #11Q

APPEARANCES –

For Applicant: Adam W. Rothkrug.

For Opposition: Thomas Buscher, Gerda Soria, Nancy Adams and Kathleen Cronin.

**ACTION OF THE BOARD** – Laid over to March 17, 2009, at 1:30 P.M., for an adjourned hearing.

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## 236-08-BZ

APPLICANT – Sheldon Lobel, for Joey Aini, owner.

SUBJECT – Application September 18, 2008 – Special Permit (§73-622) for the enlargement of an existing single family residence. This application seeks to vary floor area (§23-141) and the permitted perimeter wall height (§23-631) in an R2X (OPSD) zoning district.

PREMISES AFFECTED – 1986 East 3<sup>rd</sup> Street, west side of East 3<sup>rd</sup> Street, 100' south of Avenue S, Block 7105, Lot 152, Borough of Brooklyn.

## COMMUNITY BOARD #15BK

APPEARANCES –

For Applicant: Elizabeth Safian and Warren Meister.

**ACTION OF THE BOARD** – Laid over to March 3, 2009, at 1:30 P.M., for continued hearing.

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## 258-08-BZ

APPLICANT – Rizzo Group, for Robert G. Friedman, owner; Mid City Gym and Tanning LLC, lessee.

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SUBJECT – Application October 20, 2008 – Special Permit (§73-36) to allow the proposed Physical Culture Establishment on the cellar in a 41-story mixed-use building. The proposal is contrary to ZR § 32-10. C6-4 district.

PREMISES AFFECTED – 343-349 West 42<sup>nd</sup> Street, located on 42<sup>nd</sup> Street, mid-block between 8<sup>th</sup> Avenue and 9<sup>th</sup> Avenue, Block 1033, Lot 9, Borough of Manhattan.

**COMMUNITY BOARD #4M**

APPEARANCES –

For Applicant: Kenneth Barbina.

THE VOTE TO CLOSE HEARING –

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

Negative:.....0

**ACTION OF THE BOARD** – Laid over to February 24, 2009, at 1:30 P.M., for decision, hearing closed.

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*Jeff Mulligan, Executive Director*

*Adjourned: P.M.*

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## \*CORRECTION

This resolution adopted on October 28, 2008, under Calendar No. 268-07-BZ and printed in Volume 93, Bulletin Nos. 41-43, is hereby modified to read as follows:

### 268-07-BZ

#### CEQR #08-BSA-036K

APPLICANT – Eric Palatnik, P.C., for Congregation Adath Jacob, owner.

SUBJECT – Application March 21, 2008 – Variance (§72-21) to permit the development of a new Use Group 4 synagogue with two accessory Use Group 4 apartments (for Rabbi and visiting dignitaries). The proposal is contrary to §24-11 (Total Floor Area and Lot Coverage), §24-35 (Side Yard), §24-36 (Rear Yard), §24-551 (Setback), and §25-31 (Community facility parking). R5 district.

PREMISES AFFECTED – 1644 48<sup>th</sup> Street, south side of 48<sup>th</sup> Street, between 16<sup>th</sup> and 17<sup>th</sup> Avenues, Block 5448, Lot 27, Borough of Brooklyn.

#### COMMUNITY BOARD #12BK

#### APPEARANCES –

For Applicant: Eric Palatnik.

**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 Montanez.....5

Negative:.....0

#### THE RESOLUTION:

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated April 9, 2008, acting on Department of Buildings Application No. 310051467, reads, in pertinent part:

1. Proposed total floor area is contrary to ZR 24-11;
2. Proposed lot coverage is contrary to ZR 24-11;
3. Proposed side yard is contrary to ZR 24-35;
4. Proposed rear yard is contrary to ZR 24-36;
5. Proposed community facility parking is contrary to ZR 25-31;
6. Proposed required setback for tall residential buildings is contrary to ZR 24-551;”

and

WHEREAS, this is an application for a variance pursuant to ZR § 72-21, to permit, on a site within an R5 zoning district, a three-story and cellar building to be occupied by a synagogue (Use Group 4) and accessory Rabbi’s residence, which does not comply with rear and side yard, side setback, and parking requirements for community facilities, contrary to ZR §§ 24-35, 24-36, 25-31, 24-551; and

WHEREAS, a public hearing was held on this application on May 13, 2008, after due notice by publication in *The City Record*, with continued hearings on September 16, 2008 and then to decision on October 28, 2008; 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 12, Brooklyn, recommends approval of the application, subject to certain conditions; and

WHEREAS, certain members of the community provided testimony in support of the proposal; and

WHEREAS, two adjacent property owners initially opposed the application but later withdrew their opposition to the proposed variance; and

WHEREAS, this application is being brought on behalf of Congregation Adath Jacob, a non-profit religious entity (the “Synagogue”); and

WHEREAS, the subject premises is located on the south side of 48<sup>th</sup> Street between 16<sup>th</sup> Avenue and 17<sup>th</sup> Avenue within an R5 zoning district and has a lot area of approximately 4,007 sq. ft.; and

WHEREAS, the subject site is currently vacant; and

WHEREAS, the proposal provides for the following uses: (1) a mikvah bath and multi-purpose room on the cellar level; (2) a synagogue on the first floor; and (3) an accessory Rabbi’s residence on the second floor and third floor; and

WHEREAS, the applicant initially proposed a synagogue building with the following parameters: approximately 8,272 sq. ft. of community facility floor area; an FAR of 2.06 (2.0 FAR is the maximum permitted); a lot coverage of 76 percent (50 percent is the maximum permitted); a rear yard of 2’-0” (a 30’-0” rear yard is required above the first floor or 23’-0”); a staircase encroachment into the side yard, and a balcony encroachment into the front yard; and

WHEREAS, the proposal was revised during the hearing process; the current proposal provides for a synagogue building with approximately 7,368 sq. ft. of floor area, an FAR of 1.84, a lot coverage of 61 percent, a rear setback above the first floor of 12’-0” and a complying rear yard above the second floor, and the elimination of the encroachments into the side yard and front yard; and

WHEREAS, additionally, the applicant proposes: two side yards, each with a width of 4’-0” (two side yards with minimum widths of 8’-0” each are required); a bulkhead encroachment into the side setback; and no accessory parking (12 accessory parking spaces are required); and

WHEREAS, the applicant states that the following are the primary programmatic needs of the Synagogue which necessitate the requested variances: (1) to accommodate the congregation of approximately 110 families; and (2) to provide a residence for the Synagogue’s rabbi; and

WHEREAS, the applicant further states that its existing synagogue located nearby at 1569 47<sup>th</sup> Street consists of approximately 31,600 sq. ft. of floor area on a zoning lot containing 10,000 sq. ft. of lot area, which is far in excess of its needs; and

WHEREAS, the applicant represents that the expense of maintaining its existing building has forced it rent out space to other users and it therefore seeks a synagogue building which can better accommodate the size of its congregation; and

WHEREAS, the Board acknowledges that the Synagogue, as a religious institution, is entitled to significant deference under the law of the State of New York as to zoning

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and as to its ability to rely upon programmatic needs in support of the subject variance application; and

WHEREAS, specifically, as held in Westchester Reform Temple v. Brown, 22 NY2d 488 (1968), a religious institution's application is to be permitted unless it can be shown to have an adverse effect upon the health, safety, or welfare of the community, and general concerns about traffic and disruption of the residential character of a neighborhood are insufficient grounds for the denial of an application; and

WHEREAS, the applicant provided a submission briefing the prevailing New York State case law on religious deference; and

WHEREAS, the Board notes that under well-established precedents of the courts, a Rabbi's residence on the site of a religious institution is construed to be a religious use entitled to deference by a zoning board (see Jewish Recon. Syn. v. Vill. of Roslyn, 38 N.Y.2d 283 (1975)); and

WHEREAS, the subject site has a width of 40'-0"; and

WHEREAS, the applicant states that the variances to lot coverage, rear yard, side yard and side yard setback would enable the Synagogue to develop the site with a building with viable floor plates; and

WHEREAS, at hearing, the Board asked the applicant to demonstrate the necessity for the side yard waivers; and

WHEREAS, the applicant submitted plans indicating the occupancy of the synagogue and demonstrating the inability to accommodate the congregation within a complying structure; and

WHEREAS, based upon the above, the Board finds that the programmatic needs of the Synagogue create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

WHEREAS, the applicant need not address ZR § 72-21(b) since the Synagogue is a not-for-profit organization and the proposed development will be in furtherance of its not-for-profit mission; 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 states that that the proposed use and floor area are permitted in the subject zoning district; and

WHEREAS, the applicant represents that the scale and bulk of the Synagogue is consistent with the with the scale of the two-and-a-half-story homes that characterize the area; and

WHEREAS, the applicant submitted photographs of nearby homes which were compatible with the scale and bulk of the proposed Synagogue; and

WHEREAS, the Board directed the applicant to explore other designs to improve compatibility with adjacent buildings; and

WHEREAS, specifically, the Board suggested that the applicant provide a complying rear yard above the second floor by shifting the bulk of the building to its front; and

WHEREAS, in response, the applicant re-designed the

building to provide a 12'-0" rear setback above the second floor and a complying rear yard above the second floor; and

WHEREAS, at hearing the Board also questioned the necessity for the proposed encroachments of a staircase into the side yard and of a balcony into the front yard; and

WHEREAS, the applicant submitted revised plans showing the relocation of the staircase to the rear of the structure and eliminating the balcony; and

WHEREAS, as to traffic and parking impacts, the applicant noted that the impacts would be minimal as a majority of congregants live nearby and would walk to services, specifically to worship services on Fridays and Saturdays when they are not permitted to drive; and

WHEREAS, a submission by the applicant indicates that 95 percent of the congregation live within three-quarters of a mile from the subject site; and

WHEREAS, in response to concerns by the Board regarding egress, the applicant redesigned the building to include an exterior staircase at the rear of the second and third floors; and

WHEREAS, additionally, the applicant agreed to include the following changes to the proposal: (1) the addition of an interior garbage storage area; and (2) the addition of translucent privacy windows; and

WHEREAS, accordingly, the Board finds that this action will neither 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 applicant states that the hardship was not self-created and that no development that would meet the programmatic needs of the Synagogue could occur on the existing lot; and

WHEREAS, accordingly, the Board finds that the hardship herein was not created by the owner or a predecessor in title; and

WHEREAS, as noted, during the hearing process the applicant revised the proposal to provide a 12'-0" rear setback above the first floor and a complying rear yard above the second floor, thereby reducing the overall floor area by 755 sq. ft. and providing additional light and air to adjacent homes; and

WHEREAS, the applicant also eliminated proposed encroachments into the side yard and front yard; and

WHEREAS, the Board considered the modifications noted above and finds the requested waivers to be the minimum necessary to afford the Synagogue the relief needed both to meet its programmatic needs and to construct a building that is compatible with the character of the neighborhood; and

WHEREAS, 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. 08BSA036K, dated March 18, 2008; and

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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, 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, 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 § 72-21 and grants a variance, to permit, on a site within an R5 zoning district, a three-story and cellar building to be occupied by a synagogue and accessory Rabbi's residence, which does not comply with rear and side yard, side setback, and parking requirements for community facilities, contrary to ZR §§ 24-35, 24-36, 25-31, and 24-551, *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 22, 2008" – Eight (8) sheets; and *on further condition*:

THAT the building parameters shall be: floor area of 7,368 sq. ft. an FAR of 1.84; a lot coverage of 61 percent; a rear yard at the first floor of 2'-0", a rear setback above the first floor of 12'-0"; a complying rear yard above the second floor; two side yards of 4'-0"; an encroachment into the side setback; and no accessory parking;

THAT any change in control or ownership of the building shall require the prior approval of the Board;

THAT the use shall be limited to a house of worship (U.G.4) and Rabbi's residence;

THAT no commercial catering shall take place onsite;

THAT garbage shall be stored inside the building except when in the designated area for pick-up;

THAT landscaping shall comply with the regulations for a community facility building in a residential district set forth in ZR §§ 24-05 and 24-06;

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

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, October 28, 2008.

**\*The resolution has been corrected by: (i) addition of the DOB objections to proposed floor area and lot coverage contrary to ZR § 24-11; (ii) identification of the proposed development as a Use Group 4 Synagogue; and (iii) correction of the FAR and square footage. Corrected in Bulletin No. 6, Vol. 94, dated February 12, 2009.**

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*Jeff Mulligan, Executive Director*

*Adjourned: P.M.*