
BULLETIN

OF THE NEW YORK CITY BOARD OF STANDARDS AND APPEALS

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February 13, 2013

DIRECTORY

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52-13-BZ

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53-13-BZ

116-118 East 169th Street, corner of Walton Avenue and East 169th Street with approx. 198.7' of frontage along East 169th Street and 145.7' along Walton Avenue., Block 2466, Lot(s) 11, 16, & 17, Borough of **Bronx, Community Board: 4**. Variance (§72-21) to permit the enlargement of the existing UG 3 school, located within an R8 zoning district, which exceeds the 23' one-story maximum permitted obstruction in the required rear yard and is therefore contrary to ZR §§24-36 and 24-33(b).

54-13-BZ

1338 East 5th Street, western side of East 5th Street between Avenue L and Avenue M., Block 6540, Lot(s) 23, Borough of **Brooklyn, Community Board: 12**. Variance (§72-21) to permit the enlargement of the existing single-family residence at contrary §§23-141 (lot coverage and open space), 113-543 (minimum required side yards), and 23-461a (side yards for single-or two-family residences). R5/OPSD zoning district.

55-13-BZ

1690 60th Street, north side of 17th Avenue between 60th and 61st Street., Block 5517, Lot(s) 39, Borough of **Brooklyn, Community Board: 12**. Variance (§72-21) to permit the enlargement of an existing existing yeshiva dormitory. R5 zoning district.

56-13-BZ

201 East 56th Street, East 56th Street, Third Avenue and East 57th Street., Block 1303, Lot(s) 4, Borough of **Bronx, Community Board: 6**. Special Permt (§73-36) to permit the operation of a physical culture establishment within a portion of an existing building. C6-6(MID)C5-2 zoning district.

57-13-BZ

282 Beaumont Street, south of Oriental Boulevard, Block 8739, Lot(s) 71, Borough of **Brooklyn, Community Board: 15**. Special Permit (§73-622) to permit the enlargement of a two story dwelling with attic and cellar. R3-1 zoning district.

58-13-A

4 Wiman Place, west side of Wiman Place, south of Sylvaton Terrace and north of Church Lane., Block 2827, Lot(s) 205, Borough of **Staten Island, Community Board: 1**. Appeal from decision of Borough Commissioner denying permission for proposed construction of a twelve-family residential building located partially within the bed of a mapped but unbuilt street.

59-13-A

11-30 143rd Place, West side of 143rd Place, 258.57' south of 11th Avenue., Block 4434, Lot(s) 147, Borough of **Queens, Community Board: 7**. Propose to waive the requirements of GCL35 and to permit the construction of a new one family residence located in the bed of a mapped street.

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

CALENDAR

FEBRUARY 26, 2013, 10:00 A.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday morning, February 26, 2013, 10:00 A.M., at 22 Reade Street, Spector Hall, New York, N.Y. 10007, on the following matters:

SPECIAL ORDER CALENDAR

239-02-BZ

APPLICANT – Greenberg Traurig, LLP by Deirdre A. Carson, Esq., for Babbo Realty LLC, owner.

SUBJECT – Application November 9, 2012 – Extension of Term of a previously granted Variance (§72-21) for the continued operation of a Use Group 6A eating and drinking establishment, (*Babbo*) located at the cellar level, ground floor, and second floor of the subject premises, which expired on December 17, 2012. R7-2 zoning district.

PREMISES AFFECTED – 110 Waverly Place, south side of Waverly Place, between Sixth Avenue and Washington Square West/MacDougal Street, Block 552, Lot 53, Borough of Manhattan.

COMMUNITY BOARD #2M

374-04-BZ

APPLICANT – Greenberg Traurig, LLP by Deirdre A. Carson, Esq., owner.

SUBJECT – Application December 5, 2012 – Extension of Time to complete construction of a previously-granted Variance (§72-21) for the development of a seven-story residential building with ground floor commercial space, which expired on October 18, 2009; Amendment to approved plans; and waiver of the Rules. C6-2A zoning district/SLMD.

PREMISES AFFECTED – 246 Front Street, fronting on Front and Water Streets, 126' north of intersection of Peck Slip and Front Street, Block 107, Lot 34, Borough of Manhattan.

COMMUNITY BOARD #1M

APPEALS CALENDAR

110-10-BZY

APPLICANT – Sheldon Lobel, P.C., for Castle Hill Equities LLC c/o Blake Partners LLC, owner.

SUBJECT – Application November 19, 2012 – Extension of Time to complete construction and obtain a Certificate of Occupancy of a previous Board approval pursuant to §11-332 permitting the extension of time to complete construction of a minor development commenced under the prior R6 zoning, which expired on October 19, 2012. R5A zoning district.

PREMISES AFFECTED – 123 Beach 93rd Street, western side of Beach 93rd Street with frontage on Shore Front Parkway and Cross Bay Parkway, Block 16139, Lot 11, Borough of Queens.

COMMUNITY BOARD #14Q

201-10-BZY

APPLICANT – Law Offices of Marvin B. Mitzner, for LES Realty Group, LLC, owner.

SUBJECT – Application October 29, 2010 – Extension of time (§11-332) to complete construction of a minor development commenced under the prior C6-1 zoning district. C4-4A zoning district.

PREMISES AFFECTED – 180 Orchard Street, Orchard Street to Ludlow Street, Block 412, Lot 5, Borough of Manhattan.

COMMUNITY BOARD #3M

288-12-A thru 290-12-A

APPLICANT – Rothkrug Rothkrug & Spector LLP, for Orin, Inc., owner.

SUBJECT – Application October 9, 2012 – Proposed construction of three two family homes not fronting on a legally mapped street contrary to General City Law Section 36. R3X (SRD) zoning district.

PREMISES AFFECTED – 319, 323, 327 Ramona Avenue, northwest corner of intersection of Ramona Avenue and Huguenot Avenue, Block 6843, Lot 2, 3, 4, Borough of Staten Island.

COMMUNITY BOARD #3SI

304-12-A

APPLICANT – Eric Palatnik, P.C., for Success Team Development, LLC, owner.

SUBJECT – Application October 26, 2012 – Proposed seven-story residential development located within the mapped but inbuilt portion of Ash Avenue, pursuant to Section 35 of the General City Law. R6A zoning district.

PREMISES AFFECTED – 42-32 147th Street, west side, south of the intersection of Sanford Avenue and 147th Street, Block 5374, Lot 59, Borough of Queens.

COMMUNITY BOARD #7Q

CALENDAR

FEBRUARY 26, 2013, 1:30 P.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday afternoon, February 26, 2013, at 1:30 P.M., at 22 Reade Street, Spector Hall, New York, N.Y. 10007, on the following matters:

ZONING CALENDAR

250-12-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Carla Zeitouny and Raymond Zeitouny, owners.

SUBJECT – Application August 13, 2012 – Special Permit (§73-622) for the enlargement of an existing single family home contrary to floor area, lot coverage and open space (ZR §23-141); side yards (ZR §23-461); less than the required rear yard (ZR §23-47) and perimeter wall height (ZR §23-631). R3-2 zoning district.

PREMISES AFFECTED – 2410 Avenue S, south side of Avenue S, between East 24th and Bedford Avenue, Block 7303, Lot 4, Borough of Brooklyn.

COMMUNITY BOARD #15BK

315-12-BZ

APPLICANT – Akerman Senterfitt, LLP, for Pali Realty LLC, owner.

SUBJECT – Application November 20, 2012 – Special Permit (§73-50) to permit a modification of the rear yard requirements Z.R.§33-29 (Special Provisions applying along District Boundaries). C4-3 zoning district.

PREMISES AFFECTED – 23-25 31st Street, east side of 31st Street, between 23rd Avenue and 23rd Road, Block 835, Lot 27 & 31, Borough of Queens.

COMMUNITY BOARD #1Q

318-12-BZ

APPLICANT – Rothkrug Rothkrug & Spector, LLP, for 45-47 Crosby Street Tenant Corp./CFA Management, owner; SoulCycle 45 Crosby Street, LLC, lessee.

SUBJECT – Application November 29, 2012 – Special permit (§73-36) to permit a physical culture establishment (*SoulCycle*) within a portion of an existing building. M1-5B zoning district.

PREMISES AFFECTED – 45 Crosby Street, east side of Crosby Street, 137.25' north of intersection with Broome Street, Block 482, Lot 3, Borough of Manhattan.

COMMUNITY BOARD #2M

320-12-BZ

APPLICANT – Rothkrug Rothkrug & Spector, LLP, for West 116 Owners Realty LLC, owner; Blink 116th Street, Inc., lessee.

SUBJECT – Application December 6, 2012 – Special Permit (§73-36) to permit a physical culture establishment (*Blink Fitness*). C4-5X zoning district.

PREMISES AFFECTED – 23 West 116th Street, north side of West 116th Street, 450' east of intersection of Lenox Avenue and W. 116th Street, Lot 1600, Lot 20, Borough of Manhattan.

COMMUNITY BOARD #10M

Jeff Mulligan, Executive Director

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**REGULAR MEETING
TUESDAY MORNING, FEBRUARY 5, 2013
10:00 A.M.**

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

SPECIAL ORDER CALENDAR

39-65-BZ

APPLICANT – Eric Palatnik, P.C., for SunCo. Inc. (R & M), owners.

SUBJECT – Application March 13, 2012 – Amendment of a previously-approved variance (§72-01) to convert repair bays to an accessory convenience store at a gasoline service station (*Sunoco*); Extension of Time to obtain a Certificate of Occupancy, which expired on January 11, 2000; and Waiver of the Rules. C3 zoning district.

PREMISES AFFECTED – 2701-2711 Knapp Street and 3124-3146 Voohries Avenue, Block 8839, Lot 1, Borough of Brooklyn.

COMMUNITY BOARD #15BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins,
Commissioner Hinkson and Commissioner Montanez4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, this is an application for a waiver of the Rules of Practice and Procedure, a reopening, an extension of time to obtain a certificate of occupancy, and an amendment to permit certain modifications to the site; and

WHEREAS, a public hearing was held on this application on July 17, 2012, after due notice by publication in *The City Record*, with continued hearings on October 30, 2012 and January 8, 2013, and then to decision on February 5, 2013; 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 15, Brooklyn, recommends approval of this application; and

WHEREAS, the site is located on the southeast corner of Knapp Street and Voorhies Avenue, within a C3 zoning district; and

WHEREAS, the Board has exercised jurisdiction over the subject site since March 16, 1965 when, under the subject calendar number, the Board granted a variance to permit the construction of an automotive service station with accessory uses including the storage of boats and public parking; and

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

WHEREAS, most recently, on August 11, 1998, the Board granted an extension of time to obtain a certificate of occupancy, which expired on August 11, 1999; and

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

WHEREAS, the applicant also requests an amendment to eliminate the automotive repair service use and convert the automotive repair bays to an accessory convenience store; and

WHEREAS, the Board notes that Technical Policy and Procedure Notice (TPPN) # 10/99, provides that a retail convenience store located on the same zoning lot as a gasoline service station will be deemed accessory if: (i) the accessory convenience store is contained within a completely enclosed building; and (ii) the accessory convenience store has a maximum retail selling space of 2,500 sq. ft. or 25 percent of the zoning lot area, whichever is less; and

WHEREAS, the applicant represents that the proposed convenience store is located within an enclosed building and has a retail selling space of less than 2,500 sq. ft. or 25 percent of the zoning lot area; and

WHEREAS, at hearing the Board directed the applicant to provide landscaping on the site as shown in the previously-approved plans; and

WHEREAS, in response, the applicant submitted revised plans reflecting that the existing landscaping will be trimmed and manicured and 4'-0" evergreen shrubs will be planted; and

WHEREAS, based upon its review of the record, the Board finds the amendment to the approved plans is appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *amends* the resolution, dated March 16, 1965, so that as amended this portion of the resolution shall read: “to grant an extension of time to obtain a certificate of occupancy for one year from the date of this grant, to expire on February 5, 2014, and to permit the noted site modifications; *on condition* that all work shall substantially conform to drawings as they apply to the objections above-noted, filed with this application and marked ‘Received January 22, 2013’–(6) sheets; and *on further condition*:

THAT all signage will comply with C3 zoning district regulations;

THAT landscaping will be provided and maintained in accordance with the BSA-approved plans;

THAT the above conditions will appear on the certificate of occupancy;

THAT a new certificate of occupancy will be obtained by February 5, 2014;

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

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

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed

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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) and/or configuration(s) not related to the relief granted.” (DOB Application No. 320359465)

Adopted by the Board of Standards and Appeals February 5, 2013.

85-91-BZ

APPLICANT – Carl A. Sulfaro, Esq. for Lada Limited Liability Company, owner; Bayside Veterinary Center, lessee.

SUBJECT – Application August 20, 2012 – Extension of Term (§11-411) of a previously granted variance for a veterinarian’s office, accessory dog kennels and a caretaker’s apartment which expired on July 21, 2012; amendment to permit a change to the hours of operation and accessory signage. R3-1 zoning district.

PREMISES AFFECTED – 204-18 46th Avenue, south side of 46th Avenue 142.91' east of 204th Street. Block 7304, Lot 17, Borough of Queens.

COMMUNITY BOARD #11Q

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, this is an application for a reopening, an extension of term for the continued use of the site as a veterinarian’s office (Use Group 6) with accessory kennels and a caretaker’s apartment (Use Group 16), which expired on July 21, 2012, and an amendment to permit certain modifications to the site; and

WHEREAS, a public hearing was held on this application on November 20, 2012, after due notice by publication in *The City Record*, with a continued hearing on January 8, 2013, and then to decision on February 5, 2013; and

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

WHEREAS, Community Board 11, Queens, recommends approval of this application, with the condition that the term be limited to five years; and

WHEREAS, the site is located on the south side of 46th Avenue between 204th Street and the Clearview Expressway Service Road, within an R3-1 zoning district; and

WHEREAS, the site has 80 feet of frontage on 46th Avenue, a depth of 100 feet, and a total lot area of 8,000 sq. ft.; and

WHEREAS, the site is occupied by a two-story building with veterinarian’s office (Use Group 6) at the first floor, an accessory caretaker’s apartment at the second floor, and accessory kennels in a separate building; and

WHEREAS, the Board has exercised jurisdiction over the subject site since June 22, 1954 when, under BSA Cal. No. 698-53-BZ, the Board granted a variance to permit the maintenance of dog kennels, the practice of veterinary medicine, a caretakers apartment, and an accessory garage in a residential district, for a term of ten years; and

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

WHEREAS, on July 21, 1992, the Board granted the re-establishment of the lapsed variance, to permit a veterinarian’s office (Use Group 6) and accessory dog kennels with a caretaker’s apartment (Use Group 16), and a proposed structural alteration to the interior of the buildings, for a term of ten years; and

WHEREAS, a condition of the grant was that adjoining Lot 14 not be used in conjunction with the uses on the site; and

WHEREAS, most recently, on June 15, 2004, the Board granted an extension of term for ten years from the expiration of the prior grant, to expire on July 21, 2012; and

WHEREAS, the applicant now requests an additional ten-year extension of term; and

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

WHEREAS, the applicant also requests an amendment to permit: (1) a non-illuminated sign to be erected at the property solely identifying the name “Bayside Veterinary Center”; (2) an extension of the hours of operation; and (3) the use of a small portion of Lot 14 for the maneuvering of customer vehicles; and

WHEREAS, as to the hours of operation, the applicant states that the existing hours are: Monday through Friday, from 9:00 a.m. to 7:00 p.m.; Saturday, from 9:00 a.m. to 12:00 p.m.; and closed on Sundays; and

WHEREAS, the applicant requests that the hours be extended on Saturdays to 9:00 a.m. to 7:00 p.m., since many local pet owners have limited time during the week to visit the site and the demand for veterinary services is increased on Saturdays; and

WHEREAS, as to the parking, the applicant states that the site provides on-site parking for five customer vehicles; on the east side of the office building there are two parking spaces, and the remaining three spaces are provided on the west side of the office building; and

WHEREAS, the applicant states that in order to access the most westerly parking space, it is necessary for a vehicle to cross part of vacant Lot 14 and for a small portion of the parked vehicle to remain on part of Lot 14; and

WHEREAS, the applicant further states that, in compliance with the prior resolution, the greater part of Lot 14 has been completely fenced and remains vacant, but the applicant requests that parking of customer cars partially on the open part of Lot 14 closest to 46th Avenue be permitted

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in order to accommodate the parking on the westerly side of the office building; and

WHEREAS, pursuant to ZR § 11-412, the Board may grant a request for changes to the site; and

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

Therefore it is Resolved that the Board of Standards and Appeals *reopens* and *amends* the resolution, dated July 21, 1992, 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 21, 2022, and to permit the noted modifications to the site; *on condition* that all use and operations shall substantially conform to plans filed with this application marked Received 'August 20, 2012'-(5) sheets and 'December 18, 2012'-(1) sheet; and *on further condition*:

THAT the term of the grant will expire on July 21, 2022;

THAT signage will comply with the BSA-approved plans;

THAT the hours of operation will be: Monday through Saturday, from 9:00 a.m. to 7:00 p.m.; and closed Sundays;

THAT a portion of adjoining Lot 14 may be used for the maneuvering and parking of customer cars, as illustrated on the BSA-approved plans;

THAT the above condition will be reflected on the certificate of occupancy;

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

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

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted." (DOB Application No. 401718539)

Adopted by the Board of Standards and Appeals February 5, 2013.

93-97-BZ

APPLICANT – Eric Palatnik, P.C., for Pi Associates, LLC, owner.

SUBJECT – Application March 13, 2012 – Amendment to a previously granted variance (§72-21) to permit the change in use of a portion of the second floor from accessory parking spaces to UG 6 office use. C4-3 zoning district.

PREMISES AFFECTED – 136-21 Roosevelt Avenue, between Main Street and Union Street, Block 4980, Lot 11, Borough of Queens.

COMMUNITY BOARD #7Q

ACTION OF THE BOARD – Application withdrawn.

THE VOTE TO WITHDRAW –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

Adopted by the Board of Standards and Appeals, February 5, 2013.

982-83-BZ

APPLICANT – Rothkrug Rothkrug & Spector, LLP, for Barone Properties, Inc., owner.

SUBJECT – Application August 17, 2012 – Extension of Time to obtain a Certificate of Occupancy of a previously granted variance for the continued operation of retail and office use (UG 6) which expired on July 19, 2012. R3-2 zoning district.

PREMISES AFFECTED – 191-20 Northern Boulevard, southwest corner of intersection of Northern Boulevard and 192nd Street, Block 5513, Lot 27, Borough of Queens.

COMMUNITY BOARD #11Q

ACTION OF THE BOARD – Laid over to March 12, 2013, at 10 A.M., for adjourned hearing.

167-95-BZ

APPLICANT – Walter T. Gorman, P.E., for Springfield L. I. Cemetery Society, owners.

SUBJECT – Application September 21, 2012 – Extension of Term of a previously approved variance (§72-21) which permitted the maintenance and repairs of motor operated cemetery equipment and parking and storage of motor vehicles accessory to the repair facility which expired on February 4, 2012. An amendment of the resolution by reducing the area covered by the variance. R3A zoning district.

PREMISES AFFECTED – 121-18 Springfield Boulevard, west side of Springfield Boulevard, 166/15' south of 121st Avenue, Block 12695, Lot 1, Borough of Queens.

COMMUNITY BOARD #12Q

ACTION OF THE BOARD – Laid over to March 19, 2013, at 10 A.M., for continued hearing.

211-00-BZ

APPLICANT – Sheldon Lobel, P.C., for Hoffman & Hoffman, LLC, owner.

SUBJECT – Application August 10, 2012 – Extension of Time to complete construction of a previously approved Variance (§72-21) which permitted the legalization of residential units on the second through fourth floors of a mixed use four story building, manufacturing and residential (UG 17 & 2) which expired on April 17, 2005; Amendment for minor modification to the approved plans; Waiver of the Rules. M1-2 zoning district.

PREMISES AFFECTED – 252 Norman Avenue, southeast corner of the intersection of Norman Avenue and Monitor Street, Block 2657, Lot 1, Borough Brooklyn.

COMMUNITY BOARD #1BK

ACTION OF THE BOARD – Laid over to March 5,

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2013, at 10 A.M., for continued hearing.

20-08-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Wegweiser & Ehrlich LLC, owners.

SUBJECT – Application January 3, 2013 – Extension of Time to Complete Construction of approved Special Permit (§75-53) for the vertical enlargement to an existing warehouse (UG17) which expired on January 13, 2013. C6-2A zoning district.

PREMISES AFFECTED – 53-55 Beach Street, north side of Beach Street between Greenwich Street and Collister Street, Block 214, Lot 1, Borough of Manhattan.

COMMUNITY BOARD #1M

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to February 26, 2013, at 10 A.M., for decision, hearing closed.

APPEALS CALENDAR

97-12-A & 98-12-A

APPLICANT – Fried Frank by Richard G. Leland, Esq., for Van Wagner Communications, LLC.

OWNER OF PREMISES - 620 Properties Associates, LLC.
SUBJECT – Application April 11, 2012 – Appeal challenging Department of Buildings’ determination regarding right to maintain existing advertising sign in manufacturing district. M1-5/CL zoning district.

PREMISES AFFECTED – 620 12th Avenue, between 47th and 48th Streets, Block 1095, Lot 11, Borough of Manhattan.

COMMUNITY BOARD #4M

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative:0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez4

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to two Notice of Sign Registration Rejection letters from the Borough Commissioner of the Department of Buildings (“DOB”), dated March 12, 2012, denying registration for two signs at the subject site (the “Final Determinations”), which read, in pertinent part:

The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement Unit and in connection with the application for registration of the above-referenced sign. Unfortunately, we find this documentation

inadequate to support the registration of the sign and as such, the sign is rejected from registration. The photos do not support proof of advertising sign use during relevant legal establishment periods. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on December 4, 2012, after due notice by publication in *The City Record*, and then to decision on February 5, 2013; and

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

WHEREAS, the subject site is located on the east side of 12th Avenue, between West 47th Street and West 48th Street, in an M2-4 zoning district within the Special Clinton District; and

WHEREAS, the site is occupied by a four-story building and rooftop sign structure with two advertising signs; one at the northern portion of the roof, facing northwest, and one at the southern portion of the roof, facing southwest (the “Signs”); and

WHEREAS, the Signs have dimensions of 14’-0” high by 48’-0” wide (672 sq. ft.) each and are located approximately 25 feet from the West Side Highway, a designated arterial highway pursuant to Zoning Resolution Appendix H; and

WHEREAS, pursuant to ZR § 42-55, advertising signs are not permitted within 200 feet of an arterial highway, except that advertising signs erected prior to June 1, 1968 are considered legal non-conforming uses; and

WHEREAS, this appeal is brought on behalf of the lessee of the sign structure (the “Appellant”); and

WHEREAS, the Appellant seeks a reversal of DOB’s rejection of its sign registration based on its contention that there was a permissible discontinuance of the Signs during the period from 1973 to 1989 due to the closure of the West Side Highway, and that the Signs have otherwise been used continuously for advertising purposes without any discontinuance of more than two years since their establishment prior to June 1, 1968; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

REGISTRATION REQUIREMENT

WHEREAS, the Appellant identifies the relevant statutory requirements related to sign registration in effect since 2005; and

WHEREAS, the Appellant states that under Local Law 31 of 2005, the New York City Council enacted certain amendments to existing regulations governing outdoor advertising signs; and

WHEREAS, the amendments are codified under Articles 501, 502, and 503 of the 2008 Building Code and were enacted to provide DOB with a means of enforcing the sign laws where signs had been erected and were being maintained without a valid permit; and

WHEREAS, pursuant to Article 502 (specifically,

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Building Code § 28-502.4), an outdoor advertising company is required to submit to DOB an inventory of:

all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet [60.96 m] from and within view of a public park with an area of ½ acre (5000 m) or more; and

WHEREAS, further, Local Law 31 authorized the Commissioner of DOB to promulgate rules establishing permitting requirements for certain signs; the DOB rules, enacted under Rule 49, provide specific procedures for registration of advertising signs; Rule 49-15(5) reads in pertinent part:

Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter; and

WHEREAS, subchapter B of Rule 49 (Registration of Outdoor Advertising Companies), (specifically, Rule 49-15(d)(15)(b)), sets forth the acceptable forms of evidence to establish the size and the existence of a non-conforming sign on the relevant date set forth in the Zoning Resolution; and

WHEREAS, the Appellant asserts that the acceptable forms of evidence set forth at Rule 49 are, in pertinent part as follows:

Acceptable evidence may include permits, sign-offs of applications after completion, photographs and leases demonstrating that the non-conforming use existed prior to the relevant date; and

WHEREAS, the Appellant notes that affidavits are also listed as an acceptable form of evidence; and

WHEREAS, the Appellant cites to a guidance document provided by DOB, which sets forth the instructions for filing under Rule 49 and asserts that any one of the following documents would be acceptable evidence for sign registration pursuant to Rule 49: (1) DOB –issued permit for sign erection; (2) DOB-approved application for sign erection; (3) DOB dockets/permit book indicating sign permit approval; and (4) publicly catalogued photograph from a source such as NYC Department of Finance, New York Public Library, Office of Metropolitan History, or New York State Archives; and

REGISTRATION PROCESS

WHEREAS, the Appellant states that on September 1, 2009, pursuant to the requirements of Article 502 and Rule 49, it submitted an inventory of outdoor signs under its control and Sign Registration Applications for the Signs and completed OAC3 Outdoor Advertising Company Sign Profiles, attaching the following documentation: (1)

diagrams of the Signs; (2) photographs of the Signs; and (3) 1947 DOB permits for each of the Signs; and

WHEREAS, on October 3, 2011, DOB issued two Notices of Sign Registration Deficiency, stating that it is unable to accept the Signs for registration due to “Failure to provide proof of legal establishment – permit and historical photos do not state advertising use;” and

WHEREAS, by letter dated January 12, 2012, the Appellant submitted a response to DOB, providing additional evidence, including photographs and leases, regarding the legal establishment of the Signs; and

WHEREAS, by letter dated February 9, 2012, the Appellant submitted additional materials in response to DOB’s request that the Appellant provide additional evidence as to the subject building’s use prior to 1979; and

WHEREAS, by letter, dated March 12, 2012, DOB issued the determinations which form the basis of the appeal, stating that it found the “documentation inadequate to support the registration and as such the sign is rejected from registration;” and

RELEVANT STATUTORY PROVISIONS

ZR § 42-55

Additional Regulations for Signs Near Certain Parks and Designated Arterial Highways

M1 M2 M3

In all districts, as indicated, the provisions of paragraphs (a), (b) and (c), or paragraph (d), of this Section, shall apply for #signs# near designated arterial highways or certain #public parks#.

(a) Within 200 feet of an arterial highway or a #public park# with an area of one-half acre or more, #signs# that are within view of such arterial highway or #public park# shall be subject to the following provisions:

(1) no permitted #sign# shall exceed 500 square feet of #surface area#; and

(2) no #advertising sign# shall be allowed; nor shall an existing #advertising sign# be structurally altered, relocated or reconstructed.

(b) Beyond 200 feet from such arterial highway or #public park#, the #surface area# of such #signs# may be increased one square foot for each linear foot such sign is located from the arterial highway or #public park#.

(c) The more restrictive of the following shall apply:

(1) any #advertising sign# erected, structurally altered, relocated or reconstructed prior to June 1, 1968, within 660 feet of the nearest edge of the right-of-way of an arterial highway, whose message is visible from such arterial highway, shall have legal #non-conforming use# status pursuant to Section 52-83 (Non-Conforming

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Advertising Signs), to the extent of its size existing on May 31, 1968; or

- (2) any #advertising sign# erected, structurally altered, relocated or reconstructed between June 1, 1968, and November 1, 1979, within 660 feet of the nearest edge of the right-of-way of an arterial highway, whose message is visible from such arterial highway, and whose size does not exceed 1,200 square feet in #surface area# on its face, 30 feet in height and 60 feet in length, shall have legal #non-conforming use# status pursuant to Section 52-83, to the extent of its size existing on November 1, 1979. All #advertising signs# not in conformance with the standards set forth herein shall terminate.

* * *

ZR § 42-58

Signs Erected Prior to December 13, 2000

M1 M2 M3

In all districts, as indicated, a #sign# erected prior to December 13, 2000, shall have #non-conforming use# status pursuant to Sections 52-82 (Non-Conforming Signs Other Than Advertising Signs) or 52-83 (Non-Conforming Advertising Signs) with respect to the extent of the degree of #non-conformity# of such #sign# as of such date with the provisions of Sections 42-52, 42-53 and 42-54, where such #sign# shall have been issued a permit by the Department of Buildings on or before such date.

* * *

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

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

* * *

ZR § 52-61 *Discontinuance*

General Provisions

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

The provisions of this Section shall not apply where such discontinuance of active operations is directly caused by war, strikes or other labor difficulties, a governmental program of materials rationing, or the construction of a duly authorized improvement project by a governmental body or a public utility company. . .

* * *

ZR § 52-83

Non-Conforming Advertising Signs

In all Manufacturing Districts, or in C1, C2, C4, C5-4, C6, C7 or C8 Districts, except as otherwise provided in Section...42-55, any non-conforming advertising sign except a flashing sign may be structurally altered, reconstructed, or replaced in the same location and position, provided that such structural alteration, reconstruction or replacement does not result in:

- (a) The creation of a new non-conformity or an increase in the degree of non-conformity of such sign;
- (b) An increase in the surface area of the sign; or
- (c) An increase in the degree of illumination of such sign.

* * *

Building Code § 28-502.4 – Reporting Requirement

An outdoor advertising company shall provide the department with a list with the location of signs, sign structures and sign locations under the control of such outdoor advertising company in accordance with the following provisions:

- (1) The list shall include all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet (60 960 mm) from and within view of a public park with an area of ½ acre (5000 m) or more...

* * *

RCNY § 49-15 – Sign Inventory to be Submitted with Registration Application

...(d)(5) Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter.

* * *

RCNY § 49-16 – Non-conforming Signs

- (a) With respect to each sign identified in the sign inventory as non-conforming, the registered architect or professional engineer shall request confirmation of its non-conforming status from the Department based on evidence submitted in the registration application. The Department shall review the evidence submitted and accept or deny the request within a reasonable period of time. A sign that has been identified as non-conforming on the initial registration application may remain

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erected unless and until the Department has issued a determination that it is not non-conforming...

* * *

RCNY § 49-43 – Advertising Signs

Absent evidence that revenue from the sign is clearly incidental to the revenue generated from the use on the zoning lot to which it directs attention, the following signs are deemed to be advertising signs for the purposes of compliance with the Zoning Resolution:

- (a) Signs that direct attention to a business on the zoning lot that is primarily operating a storage or warehouse use for business activities conducted off the zoning lot, and that storage or warehouse use occupies less than the full building on the zoning lot; or
- (b) All signs, other than non-commercial, larger than 200 square feet, unless it is apparent from the copy and/or depictions on the sign that it is used to direct the attention of vehicular and pedestrian traffic to the business on the zoning lot; and

THE APPELLANT’S POSITION

WHEREAS, the Appellant contends that the Final Determinations should be reversed because there was a permissible discontinuance of the Signs during the period from 1973 to 1989 due to the extraordinary circumstance of the collapse and reconstruction of the West Side Highway, and because the Signs have otherwise been used continuously for advertising purposes without any discontinuance of more than two years since their establishment prior to June 1, 1968; and

WHEREAS, specifically, the Appellant asserts that it has provided evidence that the Signs have been in continuous use as advertising signs since prior to June 1, 1968, without any interruption of two years or more, with the exception of the period when the West Side Highway was under construction; and

WHEREAS, the Appellant notes that ZR § 52-61, which requires that a non-conforming use be continued without any interruption of two years or more to maintain its status as a non-conforming use, also contemplates that under certain exceptional circumstances, discontinuance of a non-conforming use for a period exceeding two years does not divest a property owner of its right to maintain the non-conforming use; and

WHEREAS, specifically, the Appellant states that ZR § 52-61 states that where the construction of a duly authorized improvement project by a governmental body or a public utility company directly prevents the property owner from continuing a non-conforming use, the non-conforming use may not be deemed to have been “discontinued” within the meaning of the Zoning Resolution; and

WHEREAS, the Appellant states that in December 1973, the elevated West Side Highway collapsed, which led

to a governmental determination that it was no longer safe to operate any portion of the elevated highway and that it needed to be closed and dismantled; and

WHEREAS, the Appellant represents that the means for reconstructing the highway was subject to extensive controversy and debate, as well as extensive preparations and safety measures that were put into place before active dismantling could begin, and the construction of the new highway at grade required the closure and dismantling of the existing elevated highway; therefore the physical act of closing the elevated highway was the commencement of “construction” for the purposes of ZR § 52-61 and the re-opening of the West Side Highway to traffic in late 1989 or early 1990 marked the completion of such “construction”; and

WHEREAS, the Appellant contends that the reconstruction of the West Side Highway was a duly authorized improvement project by a governmental body that rendered the Signs unusable, and therefore the two-year discontinuance period was tolled pursuant to ZR § 52-61 from the collapse of the West Side Highway in 1973 to the end of construction in approximately 1989; and

WHEREAS, therefore, the Appellant argues that the Department of Finance photograph dated between 1982 and 1987 (the “1982 – 1987 DOF Photograph”) and the photograph from the 1980s showing the West Side Highway closed near the site (the “1980s Photograph”), both of which indicate an absence of advertising copy on the building’s rooftop sign structures, do not serve as evidence of the Signs’ discontinuance because any photo that shows temporary discontinuance during the period from 1973 to 1989 is irrelevant in determining the non-conforming use status of the Signs and should be disregarded; and

WHEREAS, the Appellant asserts that a reasonable reading of the phrase “directly caused by” in ZR § 52-61 encompasses the instant situation and that ZR § 52-61 does not require a physical occupation of the zoning lot by the listed activities; and

WHEREAS, the Appellant argues that two of the listed factors under ZR § 52-61, “war” and “materials rationing”, would not need to be located on the zoning lot, but rather would create general conditions under which a given use could not be continued, and there is no basis in the zoning text for setting a different locational standard for a duly authorized improvement project (such as the highway reconstruction) if the effect of rendering the use unfeasible is the same; and

WHEREAS, the Appellant contends that the closure of the elevated highway rendered the active operation of the Signs impossible; and

WHEREAS, the Appellant asserts that the Signs, located on the roof of the subject building, at a height of over 80 feet, were displayed to traffic on the elevated West Side Highway and were rented by outdoor advertising companies for this purpose, and with the elevated highway adjacent to the building closed, there were no longer any “customers” to view the signs and therefore no outdoor

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advertising company would lease the Signs to keep them in active operation; the Appellant argues that this is precisely the effect of a governmental action that ZR § 52-61 was enacted to provide protection against; and

WHEREAS, the Appellant submitted an affidavit from Yale Citrin, a principal of the subject building owner, who also testified at hearing, stating that no outdoor advertising companies would place copy on the Signs during the time between the closure of the elevated highway in 1974 and the reopening of the highway in 1989 and that the closure of the elevated highway was the direct cause of this inability to continue active operation of the Signs; and

WHEREAS, the Appellant contends that in order to continue the active operation of the Signs during the closure of the elevated highway, the owner would have had to pay an outdoor advertising company to post and maintain advertising signs; and

WHEREAS, in response to DOB's argument that that outdoor advertising companies would not negotiate contracts with advertisers simply because "the signs would be less profitable" misconstrues the reality, as indicated in the testimony and affidavit of Mr. Citrin, that advertising use of the Signs was entirely infeasible at any price during the closure, dismantling and reconstruction of the highway; and

WHEREAS, the Appellant argues that judicial precedent supports protection of property rights through a broad reading of ZR § 52-61, and that in 149 Fifth Avenue Corp. v. James Chin et al., 305 A.D. 2d 194, 759 N.Y.S.2d 455 (1st Dept, 2003), the Court interpreted ZR § 52-61 consistent with the Appellant's position in this matter; and

WHEREAS, the Appellant states that in 149 Fifth Avenue Corp. the work which caused a discontinuance of active operations of an advertising sign was repair of the building's façade, which work was performed by the building owner and the façade inspection and repair were required by a law that was applicable to all properties six stories in height or greater; and

WHEREAS, the Appellant notes that the Supreme Court reversed the Board's denial of protection under ZR § 52-61, and the Appellate Division affirmed the decision, finding that a contrary reading of the Zoning Resolution "would raise a most serious question as to whether the Zoning Resolution purports to authorize an unconstitutional taking." Id at 456; and

WHEREAS, the Appellant asserts that, similarly, in the subject case, interpreting ZR § 52-61 to find that the Signs had been discontinued for more than two years during the time of the collapse, dismantling, and reconstruction of the highway would be an unconstitutional taking; and

WHEREAS, the Appellant contends that the instant appeal is more directly within the plain meaning of ZR § 52-61 than 149 Fifth Avenue Corp., in that the latter case involved an interruption of the use caused by legally mandated work performed by the property owner himself, while in the subject case the massive undertaking that was the closure and deconstruction of the elevated West Side Highway during the 1970s and 1980s much more clearly fits

within the meaning of "duly authorized improvement project by a governmental body"; and

WHEREAS, the Appellant argues that despite the fact that in 149 Fifth Avenue Corp. the property owner himself had control over the timing of the repairs and thus the length of the interruption of the non-conforming use, the Court interpreted ZR § 52-61 to strongly favor the maintenance of property rights; and

WHEREAS, the Appellant asserts that ZR § 52-61 protects property rights where the continuance of a use would be infeasible for reasons outside the property owner's control, especially when the cause of the hardship is the government's own action, and to read ZR § 52-61 to require property owners to maintain a non-conforming use by operating at a loss because of factors completely outside their control would be an absurd result; and

DOB'S POSITION

WHEREAS, DOB asserts that even if the Signs were established as non-conforming advertising signs, such non-conforming uses would be required to terminate per ZR § 52-61, which requires a non-conforming use to terminate if for a continuous period of two years active operation of substantially all of the non-conforming use is discontinued; and

WHEREAS, DOB notes that the Appellant acknowledged that the Signs were not used from 1973 through 1989 while the West Side Highway was closed to traffic and undergoing repair, and identified the 1982-1987 DOF Photograph and the 1980s Photograph as representative of site conditions during the 16-year period when no advertising signs were displayed (the 1982-1987 DOF Photograph does not clearly show advertising signs and the 1980s Photograph shows two empty sign structures); and

WHEREAS, DOB asserts that the Appellant is incorrect that ZR § 52-61 does not apply during the time the advertising signs were not displayed, and notes that the statute does not apply where discontinuance of active operations is "directly caused by war, strikes or other labor difficulties, a governmental program of materials rationing, or the construction of a duly authorized improvement project by a governmental body or a public utility company"; and

WHEREAS, DOB argues that, since these forces must be the *direct cause* of the discontinuance, the discontinuance must result from their occurrence alone and without the intervention of another force operating from an independent source; and

WHEREAS, DOB notes that the Appellant acknowledges that the Signs were not used during this period only because the owner was unable to lease the Signs to major outdoor advertising sign companies, who in turn would not negotiate contracts with advertisers during the closure of the West Side Highway to traffic when the signs would be less profitable; therefore, although the closure of the highway was an influential factor in the Signs' disuse, the lack of a market for advertising signs in this location was the direct cause of the discontinuance, and the Zoning

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Resolution makes no allowance for discontinuance due to the absence of public demand for a non-conforming use; and

WHEREAS, DOB argues that repair work on the West Side Highway did not directly prevent use of the Signs, and based on the photographs submitted by the Appellant, the building and the sign structures remained intact during construction work on the West Side Highway, and therefore there is no basis for the claim that the highway repair work directly interfered with the Signs' use; and

WHEREAS, DOB contends that presumably the signs were not used at this time only because they would be enjoyed by a smaller audience during the closure of the West Side Highway to traffic; and

WHEREAS, DOB asserts that the exceptions to ZR § 52-61 must be read narrowly, as forces that make it impossible to continue the non-conforming use, in order to be consistent with its general purpose of restricting further investment in incompatible non-conforming uses by preventing reactivation after a significant period of inactivity; and

WHEREAS, DOB asserts that the concept of tolling ZR § 52-61 where the non-conforming advertising sign use is impossible to continue is reflected in 149 Fifth Avenue Corp., where the sign painted on a building façade needed to be removed in order to perform legally required façade inspection and repairs; and

WHEREAS, DOB argues that unlike the sign use that the Court did not deem "discontinued" within the meaning of ZR § 52-61 in 149 Fifth Avenue Corp., here the interruption in use of the Signs was not "compelled by legally mandated, duly permitted and diligently completed repairs"; and

WHEREAS, DOB asserts that in the subject case, the use did not stop due to the owner's temporary need to remove the signs to perform required repairs to the building on which the signs were located, rather, it is reasonable to assume that the use was discontinued merely because of reduced viewership; accordingly, neither the text nor 149 Fifth Avenue Corp. support the Appellant's claim that ZR § 52-61 would not operate to terminate non-conforming sign uses at the site; and

WHEREAS, accordingly, DOB concludes that the Signs were discontinued for more than two years and the non-conforming use must be terminated pursuant to ZR § 52-61; and

CONCLUSION

WHEREAS, the Board agrees with DOB that, because the use of the Signs was discontinued for more than two years during the period the West Side Highway was closed, even if the Signs were established as non-conforming advertising signs, such use was required to terminate per ZR § 52-61; and

WHEREAS, the Board finds that the 1982-1987 DOF Photograph and the 1980s Photograph indicate that the Signs were not displaying advertising copy at the time the photographs were taken, and the Board notes that the Appellant has not contested that the Signs were discontinued

for more than two years between the period from 1973 to 1989; and

WHEREAS, the Board disagrees with the Appellant's assertion that the two-year discontinuance period was tolled pursuant to ZR § 52-61 from the date of the collapse of the West Side Highway in 1973 to the end of construction in approximately 1989; and

WHEREAS, specifically, the Board notes the ZR § 52-61 requirement that a non-conforming use must be terminated if the use has been discontinued for more than two years is subject only to the following limited exceptions: where such discontinuance of active operations is *directly caused* by war, strikes or other labor difficulties, a governmental program of materials rationing, or *the construction of a duly authorized improvement project by a governmental body* or a public utility company. . . (emphasis added); and

WHEREAS, the Board agrees with DOB that in order to be exempt from the discontinuance provision of ZR § 52-61, the "construction of a duly authorized improvement project by a governmental body" must have been the *direct* cause of the discontinuance of the Signs, without the intervention of another force operating from an independent source; and

WHEREAS, the Board disagrees with the Appellant's contention that the collapse, dismantling, and reconstruction of the West Side Highway rendered the active operation of the Signs impossible; and

WHEREAS, the Board acknowledges that the closure of the highway influenced the Appellant's decision to discontinue the use of the Signs, however the Board finds that such closure did not *directly cause* the discontinuance of the Signs but rather created a market condition in which the Appellant may have been unable to lease the Signs and made the decision to discontinue their use; and

WHEREAS, the Board agrees with DOB that the lack of a market for advertising signs in this location was the direct cause of the discontinuance, and the Zoning Resolution makes no allowance for discontinuance due to the absence of public demand for a non-conforming use; and

WHEREAS, the Board notes that the closure of the highway did not require that the Appellant remove the advertising copy that was purportedly on the sign structures prior to the collapse of the highway; and

WHEREAS, the Board agrees with DOB that based on the photographs submitted by the Appellant, the building and the sign structures remained intact and accessible during construction work on the West Side Highway, and therefore there is no basis for the claim that the highway repair work *directly* interfered with the Signs' use; and

WHEREAS, the Board further agrees with DOB that the exceptions to ZR § 52-61 should be read narrowly, in order to be consistent with its general purpose of restricting further investment in incompatible non-conforming uses by preventing reactivation after a significant period of inactivity; and

WHEREAS, the Board notes that, during the period

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from approximately 1973 to 1989, the highway (1) collapsed, (2) was closed, (3) was dismantled, and (4) was reconstructed, and the Appellant acknowledges that a significant amount of time passed between the closure of the highway due to its collapse and the commencement of the dismantling and reconstruction of the highway; and

WHEREAS, the Board disagrees with the Appellant that the collapse of the highway and its subsequent closure, in and of themselves, should be considered the commencement of “the construction of a duly authorized improvement project by a governmental body”; similarly, the Board finds that the collapse and closure of the highway is not covered by any of the other exceptions to ZR § 52-61, which are limited to “war, strikes or other labor difficulties, [and] a governmental program of materials rationing”; and

WHEREAS, the Board finds that even assuming it was convinced that the dismantling and reconstruction of the highway constituted “the construction of a duly authorized improvement project by a governmental body,” the Appellant has provided no evidence that the Signs were in use as advertising signs during the period between the collapse of the highway and the actual commencement of the dismantling and reconstruction of said highway; and

WHEREAS, the Board disagrees with the Appellant that in 149 Fifth Avenue Corp., the Court interpreted ZR § 52-61 consistent with the Appellant’s position in the subject case; and

WHEREAS, the Board finds the facts of 149 Fifth Avenue Corp., where the non-conforming advertising sign was removed in order to make legally mandated building façade inspections and repairs, to be distinguishable from the subject case where the closure of the West Side Highway merely created an adverse market condition for the use of the advertising signs but did not make it physically impossible to continue their use; and

WHEREAS, the Board disagrees with the Appellant’s argument that the subject case is more directly within the plain meaning of ZR § 52-61 than 149 Fifth Avenue Corp. because the closure and reconstruction of the West Side Highway more clearly fits within the meaning of “duly authorized improvement project by a governmental body” than the need for legally mandated repair work performed by the property owner himself; and

WHEREAS, specifically, the Board finds that even assuming that the closure of the West Side Highway is more representative of a “duly authorized improvement project by a governmental body,” the critical distinction between the cases is that in 149 Fifth Avenue Corp. the discontinuance was “directly caused” by the legally mandated repair work in that the owner was physically unable to both do the repair work and continue the non-conforming use of the sign, while the discontinuance of the Signs at the site was not “directly caused” by the closure of the highway but was the result of the owner’s business decision based on the inability to find a market for the Signs; and

WHEREAS, the Board disagrees with the Appellant that the application of ZR § 52-61 in the subject case

constitutes a taking, and notes that the City’s right to eliminate non-conforming uses through zoning has been repeatedly upheld by the courts; specifically, the Board notes that the Court of Appeals has held that, “[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination[,]” and “municipalities may adopt measures regulating nonconforming uses and may, in a reasonable fashion, eliminate them.” 550 Halstead Corp. v. Zoning Bd. Of Appeals, 1 N.Y.3d 561, 562 (2003) and that DOB’s recent enforcement furthers that goal in line with what zoning regulations contemplate; and

WHEREAS, accordingly, the Board agrees with DOB that neither the text nor 149 Fifth Avenue Corp. support the Appellant’s claim that ZR § 52-61 should be tolled for the approximately 16-year period between 1973 and 1989; and

WHEREAS, the Board notes that the Appellant made supplemental arguments regarding the establishment of the Signs prior to June 1, 1968 and the continuous use of the Signs from that date until 2012; however, the Board does not find it necessary to make a determination on these issues given its conclusion that the Sign was admittedly discontinued for more than two years during the period that the West Side Highway was closed and that the discontinuance was not tolled pursuant to ZR § 52-61; and

WHEREAS, the Board notes that the Appellant has enjoyed the benefit of the Signs for more than 20 years after the reopening of the West Side Highway, and any advertising sign at the site should have been terminated prior to that time due to the discontinuance of the advertising use of the Signs for more than two years during the time between the collapse of the highway and its reconstruction; and

WHEREAS, therefore, the Board finds that DOB properly rejected the Appellant’s registration of the Signs.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determinations of the Department of Buildings, dated March 12, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, February 5, 2013.

162-12-A

APPLICANT – Davidoff Hatcher & Citron, LLP, for CBS Outdoor, Inc.

OWNER OF PREMISES: Winston Network, Inc.

SUBJECT – Application May 31, 2012 – Appeal from Department of Buildings' determination that sign is not entitled to continue non-conforming use status as advertising sign, pursuant to Z.R.§52-731. R4 zoning district.

PREMISES AFFECTED – 49-21 Astoria Boulevard North, northwest corner of Astoria Boulevard North and Hazen Street, Block 1000, Lot 19, Borough of Queens.

COMMUNITY BOARD #1Q

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative:0

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Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez4
Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Notice of Sign Registration Rejection letter from the Queens Borough Commissioner of the Department of Buildings (“DOB”), dated May 1, 2012, denying Application No. 40015701 from registration for a sign at the subject site (the “Final Determination”), which reads, in pertinent part:

The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement Unit and in connection with the application for registration of the above-referenced sign. Unfortunately, we find this documentation inadequate to support the registration of the sign and as such, the sign is rejected from registration. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on December 11, 2012, after due notice by publication in *The City Record*, and then to decision on February 5, 2013; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by Chair Srinivasan; and

WHEREAS, the subject site is located at the northwest corner of Astoria Boulevard North and Hazen Street, in an R4 zoning district; and

WHEREAS, the site is occupied by an advertising sign with dimensions of 14’-0” high by 48’-0” wide (672 sq. ft.) located on a ground structure (the “Sign”); and

WHEREAS, the Sign is located approximately 84 feet from and within view of the Grand Central Parkway, a designated arterial highway pursuant to Zoning Resolution Appendix H; and

WHEREAS, this appeal is brought on behalf of the owner of the Sign (the “Appellant”); and

WHEREAS, the Appellant seeks a reversal of DOB’s rejection of its sign registration based on its assertion that (1) ZR § 52-731 has no application to lawful, non-conforming uses that predate its adoption; and (2) the application of ZR § 52-731 would result in an unconstitutional taking of property; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

REGISTRATION REQUIREMENT

WHEREAS, under Local Law 31 of 2005, the New York City Council enacted certain amendments to existing regulations governing outdoor advertising signs; and

WHEREAS, the amendments are codified under Articles 501, 502, and 503 of the 2008 Building Code and were enacted to provide DOB with a means of enforcing the sign laws where signs had been erected and were being maintained without a valid permit; and

WHEREAS, pursuant to Article 502 (specifically, Building Code § 28-502.4), an outdoor advertising company

is required to submit to DOB an inventory of:

all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet [60.96 m] from and within view of a public park with an area of ½ acre (5000 m) or more; and

WHEREAS, further, Local Law 31 authorized the Commissioner of DOB to promulgate rules establishing permitting requirements for certain signs; the DOB rules, enacted under Rule 49, provide specific procedures for registration of advertising signs; Rule 49-15(5) reads in pertinent part:

Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter; and

WHEREAS, subchapter B of Rule 49 (Registration of Outdoor Advertising Companies), (specifically, Rule 49-15(d)(15)(b)), sets forth the acceptable forms of evidence to establish the size and the existence of a non-conforming sign on the relevant date set forth in the Zoning Resolution; and

WHEREAS, the acceptable forms of evidence set forth at Rule 49 are, in pertinent part as follows:

Acceptable evidence may include permits, sign-offs of applications after completion, photographs and leases demonstrating that the non-conforming use existed prior to the relevant date; and

WHEREAS, affidavits are also listed as an acceptable form of evidence; and

WHEREAS, a guidance document provided by DOB sets forth the instructions for filing under Rule 49 and asserts that any one of the following documents would be acceptable evidence for sign registration pursuant to Rule 49: (1) DOB –issued permit for sign erection; (2) DOB-approved application for sign erection; (3) DOB dockets/permit book indicating sign permit approval; and (4) publicly catalogued photograph from a source such as NYC Department of Finance, New York Public Library, Office of Metropolitan History, or New York State Archives; and

REGISTRATION PROCESS
WHEREAS, the parties agree that prior to September 27, 2011, the Appellant submitted a Sign Registration Application for the Sign; and

WHEREAS, on September 27, 2011, DOB notified the Appellant that its Sign Registration Application failed to establish any basis for the sign to remain, and requested proof that the Sign complied with ZR § 52-731; and

WHEREAS, on February 28, 2012, the Appellant responded that the Sign was a legal non-conforming use

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which pre-dated the adoption of ZR § 52-731 and therefore it was not applicable to the Sign; and

WHEREAS, by letter dated May 1, 2012, DOB issued the determination which forms the basis of the appeal, stating that it found the “documentation inadequate to support the registration and as such the sign is rejected from registration;” and

RELEVANT STATUTORY PROVISIONS

ZR § 52-11

General Provisions

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

* * *

ZR § 52-731

Advertising signs

In all #Residence Districts#, a #non-conforming advertising sign# may be continued for ten years after December 15, 1961, or such later date that such #sign# becomes #non-conforming#, providing that after the expiration of that period such #non-conforming advertising sign# shall terminate.

* * *

Building Code § 28-502.4 – Reporting Requirement

An outdoor advertising company shall provide the department with a list with the location of signs, sign structures and sign locations under the control of such outdoor advertising company in accordance with the following provisions:

- (1) The list shall include all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet (60 960 mm) from and within view of a public park with an area of ½ acre (5000 m) or more...

* * *

RCNY § 49-15 – Sign Inventory to be Submitted with Registration Application

...(d)(5) Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter.

* * *

RCNY § 49-16 – Non-conforming Signs

(a) With respect to each sign identified in the sign inventory as non-conforming, the registered architect or professional engineer shall request confirmation of its non-conforming status from the Department based on evidence submitted in the registration application. The Department shall

review the evidence submitted and accept or deny the request within a reasonable period of time. A sign that has been identified as non-conforming on the initial registration application may remain erected unless and until the Department has issued a determination that it is not non-conforming...

* * *

RCNY § 49-43 – Advertising Signs

Absent evidence that revenue from the sign is clearly incidental to the revenue generated from the use on the zoning lot to which it directs attention, the following signs are deemed to be advertising signs for the purposes of compliance with the Zoning Resolution:

- (a) Signs that direct attention to a business on the zoning lot that is primarily operating a storage or warehouse use for business activities conducted off the zoning lot, and that storage or warehouse use occupies less than the full building on the zoning lot; or
- (b) All signs, other than non-commercial, larger than 200 square feet, unless it is apparent from the copy and/or depictions on the sign that it is used to direct the attention of vehicular and pedestrian traffic to the business on the zoning lot; and

THE APPELLANT’S POSITION

WHEREAS, the Appellant contends that the Final Determination should be reversed because (1) ZR § 52-731 has no application to lawful, non-conforming uses that predate its adoption; and (2) the application of ZR § 52-731 would result in an unconstitutional taking of property; and

1. Legal Precedent Supports the Continuation of Pre-Existing Non-Conforming Uses

WHEREAS, the Appellant asserts that the Signs were lawfully established prior to the adoption of ZR § 52-731, and therefore such section does not apply to the Signs; and

WHEREAS, the Appellant notes that a permit for the Signs was issued by DOB in 1937; and

WHEREAS, the Appellant cites to Toys-R-Us v. Silva, 89 N.Y.2d 411, 421 (1996) for the principle that “zoning restrictions, being in derogation of common law property rights, [are] strictly construed and any ambiguity [is] resolved in favor of the property owner”; and

WHEREAS, the Appellant asserts that the Zoning Resolution protects the continued use of non-conforming signs since “[i]t is the law of this state that non-conforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding contrary provisions of the [zoning] ordinance.” Costa v. Callahan, 41 A.D. 3d 1111, 1113 (3d Dept. 2007), citing Matter of Rudolf Steiner Fellowship Found v. DeLuccia, 90 N.Y.2d 453, 463 (1997); and

WHEREAS, the Appellant argues that statutes are to be construed prospectively and not retrospectively unless

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otherwise provided (See In re Town of Islip v. Caviglia, 73 N.Y.2d 544, 560-61 (1989)), and that unlike the statute at issue in Caviglia, the Appellant asserts that ZR § 52-731 is not content-neutral since it is exclusively directed to advertising signs and not any other manner of signs, and, accordingly, the general rule of prospective construction of statutes should apply; and

WHEREAS, the Appellant claims that the subject case is distinguishable from the authorities previously relied upon by the Board in upholding the applicability of ZR § 52-731; and

WHEREAS, specifically, the Appellant asserts that (1) in 550 Halstead Corp. v. Zoning Bd. of Appeals, 1 N.Y.3d 561, 562 (2003) the non-conforming use was expanded and extended contrary to the local ordinance, whereas in this case the use as advertising signs pursuant to permits has remained constant, and (2) in Off Shore Restaurant Corp. v. Linden, 30 N.Y.2d 160 (1972), there was a clear change in use from a delicatessen to a cocktail lounge, thus requiring compliance with the municipal off-street parking requirement; and

WHEREAS, accordingly, the Appellant contends that since the statute at issue was adopted in 1963, after the non-conforming use status of the Sign, permitted in 1937, was established, it cannot be applied with respect to the Sign; and

2. DOB's Enforcement of the Sign would be an Unconstitutional Taking

WHEREAS, the Appellant asserts that the application of ZR § 52-731 would result in an unconstitutional taking of property in violation of the Fifth Amendment; and

WHEREAS, the Appellant contends that amortization provisions, such as the one set forth in ZR § 52-731, do not provide just compensation for the taking of a lawful advertising sign use consistent with the taking clause of the Fifth Amendment, which states: "...nor shall private property be taken for public use without just compensation;" and

WHEREAS, the Appellant argues that the Federal Highway Administration ("FHWA") has provided clear guidance on this issue, and has expressly determined that the removal of legal advertising signs (such as those at issue on these appeals) located on federal roads or controlled highways pursuant to the Highway Beautification Act, 23 U.S.C. 131, requires the payment of just compensation to the owner of such advertising signs; and

WHEREAS, the Appellant asserts that Congress has repeatedly rejected the amortization of lawful advertising sign uses and amended the Highway Beautification Act in 1978 to clarify that "just compensation shall be paid upon the removal" of such advertising signs; and

WHEREAS, the Appellant further asserts that, as recently as 2006, FHWA confirmed as part of a national assessment of advertising sign control programs that amortization of sign uses is no longer an issue because of the settled principle that cash compensation must be paid in connection with such takings, and that in response to efforts

by those seeking the removal of non-conforming advertising signs, FHWA noted: "some continue to advocate amortization as a means to accomplish this, but widespread use of this approach was effectively prohibited by Federal legislation;" and

WHEREAS, the Appellant argues that DOB is relying on a statute that merely provided the owners and operators of lawfully established signs a period of years to continue such operations, without regard for any cash compensation for such takings; and

WHEREAS, accordingly, the Appellant asserts that ZR § 52-731 is inconsistent with Federal guidance on this issue and, if applied as DOB intends, will impose a significant deprivation of the Appellant's constitutional rights; and

DOB'S POSITION

WHEREAS, DOB asserts that zoning regulations prohibit the Sign in the subject R4 zoning district, as set forth at ZR § 22-30, which does not include advertising signs among the permitted uses; and

WHEREAS, DOB states that non-conforming advertising signs are permitted in residential zoning districts only when they comply with Chapter 2 of Article 5 of the Zoning Resolution; and

WHEREAS, specifically, DOB cites to ZR § 52-11, which states that "a non-conforming use may be continued, except as otherwise provided in this Chapter;" and

WHEREAS, DOB continues by citing ZR § 52-731, which expressly provided a limitation on the use of non-conforming advertising signs in residential zoning districts; the original text states that:

[i]n all Residence Districts, a non-conforming advertising sign may be continued for eight years after the effective date of this resolution or such later date that such sign becomes non-conforming, provided that after the expiration of that period such non-conforming advertising sign shall terminate; and

WHEREAS, DOB notes that on August 22, 1963, the original ZR § 52-731 was amended to allow a ten-year, rather than an eight-year, amortization period; the 1963 version of the text, allowing for a ten-year amortization period remains in effect today; and

WHEREAS, DOB states that in order to maintain the Sign, the Appellant must demonstrate that: (1) the Sign is non-conforming (a lawful pre-existing non-conforming use, as defined at ZR § 12-10) and (2) it has been less than ten years since the Sign became non-conforming; and

WHEREAS, DOB asserts that the Appellant has failed to provide adequate evidence to demonstrate that the advertising sign has ever been "non-conforming" in the sense that it was lawfully established per ZR § 12-10 as "[a]ny lawful use...which does not conform to any one or more of the applicable use regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto;" and

WHEREAS, DOB states that the lawful use must have been established on December 15, 1961 or at the time of a

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relevant zoning amendment; and

WHEREAS, DOB notes that the Appellant has submitted proof of a permit issued by DOB in 1937 for a sign structure and states that if it were to assume that the sign existed lawfully on December 15, 1961, based on the 1937 permit, on December 15, 1961, it would have become “non-conforming;” and

WHEREAS, DOB states that even if the Sign existed lawfully on December 15, 1961, such a sign would have become non-conforming on that date when the site was zoned R4 and the 1963/current version of ZR § 52-731 requires that the Sign be removed within ten years of it becoming non-conforming, which was on December 15, 1971; and

WHEREAS, accordingly, DOB asserts that its rejection of the sign registration is appropriate because the Sign does not comply with ZR § 52-731; and

CONCLUSION

WHEREAS, the Board agrees with DOB that the language of ZR § 52-731 is clear and requires that because any advertising sign at the site became a non-conforming use on December 15, 1961 when it was mapped to be within an R4 zoning district, such use should have been terminated by December 15, 1971; and

WHEREAS, as to the Appellant’s assertion that DOB has improperly changed its position on the legality of the signs, the Board supports DOB’s position that it may correct the erroneous issuance of its permits; and

WHEREAS, further, the Board notes that the presence of a permit does not render a use lawful, when the permit was issued erroneously; and

WHEREAS, the Board declines to take a position on the fairness of DOB’s rejection of the registration after erroneously issuing a permit in 1937, but it does note that the Appellant has enjoyed the benefit of the Sign for more than 40 years past the December 15, 1971 date when any sign at the site should have been terminated; and

WHEREAS, the Board agrees with DOB that even if the Appellant were to establish that the Sign was lawfully non-conforming at relevant dates, the question is moot since even a lawfully non-conforming sign would have to have been terminated on or before December 15, 1971; and

WHEREAS, accordingly, the Board finds that the advertising sign use should have been terminated on or before December 15, 1971, pursuant to ZR § 52-731; and

WHEREAS, the Board notes that the ZR § 12-10 definition of non-conforming use and ZR § 52-731 contemplate prospective enforcement in that uses that were rendered non-conforming on December 15, 1961 (like the subject Sign) were able to remain for ten years so long as they were lawful on December 15, 1961 (per ZR § 12-10); and

WHEREAS, the Board notes that the adoption of the 1961 Zoning Resolution did not prohibit the continuance of non-conforming uses, but rather newly non-conforming uses were able to exist in derogation of the Zoning Resolution, but only for a specified period; and

WHEREAS, as to the applicability of statutes adopted after a use has been established, the Board notes that per the Court of Appeals, municipalities may adopt laws regarding previously existing nonconforming uses. 550 Halstead Corp., 1 N.Y.3d at 562; Matter of Toys “R” Us v Silva, 89 N.Y.2d 411, 417, (1996); and

WHEREAS, specifically, the Board notes that the Court of Appeals has held that, “[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination[.]” and “municipalities may adopt measures regulating nonconforming uses and may, in a reasonable fashion, eliminate them.” 550 Halstead Corp., 1 N.Y.3d at 562; and

WHEREAS, further, the Board notes that in Off Shore Restaurant Corp., the Court stated, “the courts do not hesitate to give effect to restrictions on non-conforming uses . . . It is because these restrictions flow from a strong policy favoring the eventual elimination of nonconforming uses” 30 N.Y.2d at 164; and

WHEREAS, the Board finds that, despite the Appellant’s attempt to distinguish the facts of 550 Halstead Corp. and Off Shore Restaurant Corp. from those of the subject case, the cited cases are relevant with regard to the above-mentioned holdings pertaining to the regulation of non-conforming uses; and

WHEREAS, the Board notes that ZR § 52-731 is not contrary to ZR § 52-11, which states that “a nonconforming use may be continued, except as otherwise provided in [Chapter 2]” because the Board notes that non-conforming uses are protected by Article V, but, as anticipated at ZR § 52-11, there are limiting conditions; and

WHEREAS, the Board finds that the Appellant has failed to provide evidence that its purported satisfaction of the Sign Registration requirement supersedes the clear, undisputed text of the Zoning Resolution; and

WHEREAS, as to the Appellant’s assertion that the application of ZR § 52-731 would amount to a regulatory taking, the Board disagrees with the Appellant that the application of zoning regulations constitutes a taking; however, the Board finds that to the extent ZR § 52-731 does constitute an unconstitutional takings action, any such claim is properly directed against the statute itself, rather than DOB’s enforcement of the statute, and such a claim is more appropriately addressed in a different forum; and

WHEREAS, the Board disagrees with the Appellant’s reliance on the Federal Highway Beautification Act, which regulates advertising signs located within 660 feet of federal roads or controlled highways, and distinguishes that statute from ZR § 52-731, which prohibits advertising signs in residential districts regardless of the proximity of such signs to an arterial or highway; and

WHEREAS, the Board notes that the purpose of ZR § 52-731, to eliminate prior non-conforming advertising signs from residential districts in which such commercial uses are incompatible, has no relationship to the stated purpose for the Federal Highway Beautification Act’s regulation of

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advertising signs, which is “to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty”; thus, the Board finds the Appellant’s reliance on the Federal Highway Beautification Act to be misguided; and

WHEREAS, the Board further notes that the Appellant has provided no evidence that the Federal Highway Beautification Act should apply to the regulation of the Sign, where DOB’s enforcement results from the location of the Sign in a residential district and not its proximity to any federal roads or controlled highways; and

WHEREAS, as noted above, in addition to the ten-year amortization period provided under ZR § 52-731, the Appellant has enjoyed the benefit of the Sign for more than 40 years past the December 15, 1971 date when any sign at the site should have been terminated; and

WHEREAS, accordingly, the Board finds that DOB properly rejected the Sign from registration.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determination of the Department of Buildings, dated May 1, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, February 5, 2013.

167-12-A

APPLICANT – Davidoff Hatcher & Citron, LLP, for Lamar Advertising of Penn LLC.

OWNER OF PREMISES: Flash Inn Inc. c/o Danny Miranda

SUBJECT – Application June 7, 2012 – Appeal from Department of Buildings’ determination that sign is not entitled to continued non-conforming use status as advertising sign, pursuant to Z.R. §52-731. R7-2 zoning district.

PREMISES AFFECTED – 101-07 Macombs Place, northwest corner of Macombs Place and West 154th Street, Block 2040, Lot 23, Borough of Manhattan.

COMMUNITY BOARD #10M

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative:0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez4

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Notice of Sign Registration Rejection letter from the Manhattan Borough Commissioner of the Department of Buildings (“DOB”), dated May 9, 2012, denying Application No. 10032201 from registration for a sign at the subject site (the “Final Determination”), which reads, in pertinent part:

The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement Unit and in connection with the application for

registration of the above-referenced sign. Unfortunately, we find this documentation inadequate to support the registration of the sign and as such, the sign is rejected from registration. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on December 11, 2012, after due notice by publication in *The City Record*, and then to decision on February 5, 2013; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by Chair Srinivasan; and

WHEREAS, the subject site is located at the northwest corner of Macombs Place and West 154th Street, in an R7-2 zoning district; and

WHEREAS, the site is occupied by a building with a rooftop sign structure supporting an advertising sign with dimensions of 20’-0” high by 48’-0” wide (960 sq. ft.) (the “Sign”); and

WHEREAS, the Sign is located approximately 200 feet from and within view of the Harlem River Drive, a designated arterial highway pursuant to Zoning Resolution Appendix H; and

WHEREAS, this appeal is brought on behalf of the owner of the Sign (the “Appellant”); and

WHEREAS, the Appellant seeks a reversal of DOB’s rejection of its sign registration based on its assertion that (1) ZR § 52-731 has no application to lawful, non-conforming uses that predate its adoption; and (2) the application of ZR § 52-731 would result in an unconstitutional taking of property; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

REGISTRATION REQUIREMENT

WHEREAS, under Local Law 31 of 2005, the New York City Council enacted certain amendments to existing regulations governing outdoor advertising signs; and

WHEREAS, the amendments are codified under Articles 501, 502, and 503 of the 2008 Building Code and were enacted to provide DOB with a means of enforcing the sign laws where signs had been erected and were being maintained without a valid permit; and

WHEREAS, pursuant to Article 502 (specifically, Building Code § 28-502.4), an outdoor advertising company is required to submit to DOB an inventory of:

all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet [60.96 m] from and within view of a public park with an area of ½ acre (5000 m) or more; and

WHEREAS, further, Local Law 31 authorized the Commissioner of DOB to promulgate rules establishing permitting requirements for certain signs; the DOB rules, enacted under Rule 49, provide specific procedures for registration of advertising signs; Rule 49-15(5) reads in

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pertinent part:

Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter; and

WHEREAS, subchapter B of Rule 49 (Registration of Outdoor Advertising Companies), (specifically, Rule 49-15(d)(15)(b)), sets forth the acceptable forms of evidence to establish the size and the existence of a non-conforming sign on the relevant date set forth in the Zoning Resolution; and

WHEREAS, the acceptable forms of evidence set forth at Rule 49 are, in pertinent part as follows:

Acceptable evidence may include permits, sign-offs of applications after completion, photographs and leases demonstrating that the non-conforming use existed prior to the relevant date; and

WHEREAS, affidavits are also listed as an acceptable form of evidence; and

WHEREAS, a guidance document provided by DOB sets forth the instructions for filing under Rule 49 and asserts that any one of the following documents would be acceptable evidence for sign registration pursuant to Rule 49: (1) DOB –issued permit for sign erection; (2) DOB-approved application for sign erection; (3) DOB dockets/permit book indicating sign permit approval; and (4) publicly catalogued photograph from a source such as NYC Department of Finance, New York Public Library, Office of Metropolitan History, or New York State Archives; and
REGISTRATION PROCESS

WHEREAS, the parties agree that prior to September 29, 2011, the Appellant submitted a Sign Registration Application for the Sign; and

WHEREAS, on September 29, 2011, DOB notified the Appellant that its Sign Registration Application failed to establish any basis for the sign to remain, and requested proof that the Sign complied with ZR § 52-731; and

WHEREAS, on February 29, 2012, the Appellant responded that the Sign was a legal non-conforming use which pre-dated the adoption of ZR § 52-731 and therefore it was not applicable to the Sign; and

WHEREAS, by letter dated May 9, 2012, DOB issued the determination which forms the basis of the appeal, stating that it found the “documentation inadequate to support the registration and as such the sign is rejected from registration;” and

RELEVANT STATUTORY PROVISIONS

ZR § 52-11

General Provisions

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

* * *

ZR § 52-731

Advertising signs

In all #Residence Districts#, a #non-conforming advertising sign# may be continued for ten years after December 15, 1961, or such later date that such #sign# becomes #non-conforming#, providing that after the expiration of that period such #non-conforming advertising sign# shall terminate.

* * *

Building Code § 28-502.4 – Reporting Requirement

An outdoor advertising company shall provide the department with a list with the location of signs, sign structures and sign locations under the control of such outdoor advertising company in accordance with the following provisions:

- (1) The list shall include all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet (60 960 mm) from and within view of a public park with an area of ½ acre (5000 m) or more...

* * *

RCNY § 49-15 – Sign Inventory to be Submitted with Registration Application

...(d)(5) Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter.

* * *

RCNY § 49-16 – Non-conforming Signs

- (a) With respect to each sign identified in the sign inventory as non-conforming, the registered architect or professional engineer shall request confirmation of its non-conforming status from the Department based on evidence submitted in the registration application. The Department shall review the evidence submitted and accept or deny the request within a reasonable period of time. A sign that has been identified as non-conforming on the initial registration application may remain erected unless and until the Department has issued a determination that it is not non-conforming...

* * *

RCNY § 49-43 – Advertising Signs

Absent evidence that revenue from the sign is clearly incidental to the revenue generated from the

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use on the zoning lot to which it directs attention, the following signs are deemed to be advertising signs for the purposes of compliance with the Zoning Resolution:

- (a) Signs that direct attention to a business on the zoning lot that is primarily operating a storage or warehouse use for business activities conducted off the zoning lot, and that storage or warehouse use occupies less than the full building on the zoning lot; or
- (b) All signs, other than non-commercial, larger than 200 square feet, unless it is apparent from the copy and/or depictions on the sign that it is used to direct the attention of vehicular and pedestrian traffic to the business on the zoning lot; and

THE APPELLANT'S POSITION

WHEREAS, the Appellant contends that the Final Determination should be reversed because (1) ZR § 52-731 has no application to lawful, non-conforming uses that predate its adoption; and (2) the application of ZR § 52-731 would result in an unconstitutional taking of property; and

1. Legal Precedent Supports the Continuation of Pre-Existing Non-Conforming Uses

WHEREAS, the Appellant asserts that the Signs were lawfully established prior to the adoption of ZR § 52-731, and therefore such section does not apply to the Signs; and

WHEREAS, the Appellant notes that a permit for the Signs was issued by DOB in 1937; and

WHEREAS, the Appellant cites to Toys-R-Us v. Silva, 89 N.Y.2d 411, 421 (1996) for the principle that “zoning restrictions, being in derogation of common law property rights, [are] strictly construed and any ambiguity [is] resolved in favor of the property owner”; and

WHEREAS, the Appellant asserts that the Zoning Resolution protects the continued use of non-conforming signs since “[i]t is the law of this state that non-conforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding contrary provisions of the [zoning] ordinance.” Costa v. Callahan, 41 A.D. 3d 1111, 1113 (3d Dept. 2007), citing Matter of Rudolf Steiner Fellowship Found v. DeLuccia, 90 N.Y.2d 453, 463 (1997); and

WHEREAS, the Appellant argues that statutes are to be construed prospectively and not retrospectively unless otherwise provided (See In re Town of Islip v. Caviglia, 73 N.Y.2d 544, 560-61 (1989)), and that unlike the statute at issue in Caviglia, the Appellant asserts that ZR § 52-731 is not content-neutral since it is exclusively directed to advertising signs and not any other manner of signs, and, accordingly, the general rule of prospective construction of statutes should apply; and

WHEREAS, the Appellant claims that the subject case is distinguishable from the authorities previously relied upon by the Board in upholding the applicability of ZR § 52-731;

and

WHEREAS, specifically, the Appellant asserts that (1) in 550 Halstead Corp. v. Zoning Bd. of Appeals, 1 N.Y.3d 561, 562 (2003) the non-conforming use was expanded and extended contrary to the local ordinance, whereas in this case the use as advertising signs pursuant to permits has remained constant, and (2) in Off Shore Restaurant Corp. v. Linden, 30 N.Y.2d 160 (1972), there was a clear change in use from a delicatessen to a cocktail lounge, thus requiring compliance with the municipal off-street parking requirement; and

WHEREAS, accordingly, the Appellant contends that since the statute at issue was adopted in 1963, after the non-conforming use status of the Sign, permitted in 1937, was established, it cannot be applied with respect to the Sign; and

2. DOB's Enforcement of the Sign would be an Unconstitutional Taking

WHEREAS, the Appellant asserts that the application of ZR § 52-731 would result in an unconstitutional taking of property in violation of the Fifth Amendment; and

WHEREAS, the Appellant contends that amortization provisions, such as the one set forth in ZR § 52-731, do not provide just compensation for the taking of a lawful advertising sign use consistent with the taking clause of the Fifth Amendment, which states: “...nor shall private property be taken for public use without just compensation;” and

WHEREAS, the Appellant argues that the Federal Highway Administration (“FHWA”) has provided clear guidance on this issue, and has expressly determined that the removal of legal advertising signs (such as those at issue on these appeals) located on federal roads or controlled highways pursuant to the Highway Beautification Act, 23 U.S.C. 131, requires the payment of just compensation to the owner of such advertising signs; and

WHEREAS, the Appellant asserts that Congress has repeatedly rejected the amortization of lawful advertising sign uses and amended the Highway Beautification Act in 1978 to clarify that “just compensation shall be paid upon the removal” of such advertising signs; and

WHEREAS, the Appellant further asserts that, as recently as 2006, FHWA confirmed as part of a national assessment of advertising sign control programs that amortization of sign uses is no longer an issue because of the settled principle that cash compensation must be paid in connection with such takings, and that in response to efforts by those seeking the removal of non-conforming advertising signs, FHWA noted: “some continue to advocate amortization as a means to accomplish this, but widespread use of this approach was effectively prohibited by Federal legislation;” and

WHEREAS, the Appellant argues that DOB is relying on a statute that merely provided the owners and operators of lawfully established signs a period of years to continue such operations, without regard for any cash compensation for such takings; and

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WHEREAS, accordingly, the Appellant asserts that ZR § 52-731 is inconsistent with Federal guidance on this issue and, if applied as DOB intends, will impose a significant deprivation of the Appellant's constitutional rights; and

DOB'S POSITION

WHEREAS, DOB asserts that zoning regulations prohibit the Sign in the subject R7-2 zoning district, as set forth at ZR § 22-30, which does not include advertising signs among the permitted uses; and

WHEREAS, DOB states that non-conforming advertising signs are permitted in residential zoning districts only when they comply with Chapter 2 of Article 5 of the Zoning Resolution; and

WHEREAS, specifically, DOB cites to ZR § 52-11, which states that "a non-conforming use may be continued, except as otherwise provided in this Chapter;" and

WHEREAS, DOB continues by citing ZR § 52-731, which expressly provided a limitation on the use of non-conforming advertising signs in residential zoning districts; the original text states that:

[i]n all Residence Districts, a non-conforming advertising sign may be continued for eight years after the effective date of this resolution or such later date that such sign becomes non-conforming, provided that after the expiration of that period such non-conforming advertising sign shall terminate; and

WHEREAS, DOB notes that on August 22, 1963, the original ZR § 52-731 was amended to allow a ten-year, rather than an eight-year, amortization period; the 1963 version of the text, allowing for a ten-year amortization period remains in effect today; and

WHEREAS, DOB states that in order to maintain the Sign, the Appellant must demonstrate that: (1) the Sign is non-conforming (a lawful pre-existing non-conforming use, as defined at ZR § 12-10) and (2) it has been less than ten years since the Sign became non-conforming; and

WHEREAS, DOB asserts that the Appellant has failed to provide adequate evidence to demonstrate that the advertising sign has ever been "non-conforming" in the sense that it was lawfully established per ZR § 12-10 as "[a]ny lawful use...which does not conform to any one or more of the applicable use regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto;" and

WHEREAS, DOB states that the lawful use must have been established on December 15, 1961 or at the time of a relevant zoning amendment; and

WHEREAS, DOB notes that the Appellant has submitted proof of a permit issued by DOB in 1937 for a sign structure and states that if it were to assume that the sign existed lawfully on December 15, 1961, based on the 1937 permit, on December 15, 1961, it would have become "non-conforming;" and

WHEREAS, DOB states that even if the Sign existed lawfully on December 15, 1961, such a sign would have become non-conforming on that date when the site was

zoned R7-2 and the 1963/current version of ZR § 52-731 requires that the Sign be removed within ten years of it becoming non-conforming, which was on December 15, 1971; and

WHEREAS, accordingly, DOB asserts that its rejection of the sign registration is appropriate because the Sign does not comply with ZR § 52-731; and

CONCLUSION

WHEREAS, the Board agrees with DOB that the language of ZR § 52-731 is clear and requires that because any advertising sign at the site became a non-conforming use on December 15, 1961 when it was mapped to be within an R7-2 zoning district, such use should have been terminated by December 15, 1971; and

WHEREAS, as to the Appellant's assertion that DOB has improperly changed its position on the legality of the signs, the Board supports DOB's position that it may correct the erroneous issuance of its permits; and

WHEREAS, further, the Board notes that the presence of a permit does not render a use lawful, when the permit was issued erroneously; and

WHEREAS, the Board declines to take a position on the fairness of DOB's rejection of the registration after erroneously issuing a permit in 1937, but it does note that the Appellant has enjoyed the benefit of the Sign for more than 40 years past the December 15, 1971 date when any sign at the site should have been terminated; and

WHEREAS, the Board agrees with DOB that even if the Appellant were to establish that the Sign was lawfully non-conforming at relevant dates, the question is moot since even a lawfully non-conforming sign would have to have been terminated on or before December 15, 1971; and

WHEREAS, accordingly, the Board finds that the advertising sign use should have been terminated on or before December 15, 1971, pursuant to ZR § 52-731; and

WHEREAS, the Board notes that the ZR § 12-10 definition of non-conforming use and ZR § 52-731 contemplate prospective enforcement in that uses that were rendered non-conforming on December 15, 1961 (like the subject Sign) were able to remain for ten years so long as they were lawful on December 15, 1961 (per ZR § 12-10); and

WHEREAS, the Board notes that the adoption of the 1961 Zoning Resolution did not prohibit the continuance of non-conforming uses, but rather newly non-conforming uses were able to exist in derogation of the Zoning Resolution, but only for a specified period; and

WHEREAS, as to the applicability of statutes adopted after a use has been established, the Board notes that per the Court of Appeals, municipalities may adopt laws regarding previously existing nonconforming uses. 550 Halstead Corp., 1 N.Y.3d at 562; Matter of Toys "R" Us v Silva, 89 N.Y.2d 411, 417, (1996); and

WHEREAS, specifically, the Board notes that the Court of Appeals has held that, "[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual

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elimination[.]” and “municipalities may adopt measures regulating nonconforming uses and may, in a reasonable fashion, eliminate them.” 550 Halstead Corp., 1 N.Y.3d at 562; and

WHEREAS, further, the Board notes that in Off Shore Restaurant Corp., the Court stated, “the courts do not hesitate to give effect to restrictions on non-conforming uses . . . It is because these restrictions flow from a strong policy favoring the eventual elimination of nonconforming uses” 30 N.Y.2d at 164; and

WHEREAS, the Board finds that, despite the Appellant’s attempt to distinguish the facts of 550 Halstead Corp. and Off Shore Restaurant Corp. from those of the subject case, the cited cases are relevant with regard to the above-mentioned holdings pertaining to the regulation of non-conforming uses; and

WHEREAS, the Board notes that ZR § 52-731 is not contrary to ZR § 52-11, which states that “a nonconforming use may be continued, except as otherwise provided in [Chapter 2]” because the Board notes that non-conforming uses are protected by Article V, but, as anticipated at ZR § 52-11, there are limiting conditions; and

WHEREAS, the Board finds that the Appellant has failed to provide evidence that its purported satisfaction of the Sign Registration requirement supersedes the clear, undisputed text of the Zoning Resolution; and

WHEREAS, as to the Appellant’s assertion that the application of ZR § 52-731 would amount to a regulatory taking, the Board disagrees with the Appellant that the application of zoning regulations constitutes a taking; however, the Board finds that to the extent ZR § 52-731 does constitute an unconstitutional takings action, any such claim is properly directed against the statute itself, rather than DOB’s enforcement of the statute, and such a claim is more appropriately addressed in a different forum; and

WHEREAS, the Board disagrees with the Appellant’s reliance on the Federal Highway Beautification Act, which regulates advertising signs located within 660 feet of federal roads or controlled highways, and distinguishes that statute from ZR § 52-731, which prohibits advertising signs in residential districts regardless of the proximity of such signs to an arterial or highway; and

WHEREAS, the Board notes that the purpose of ZR § 52-731, to eliminate prior non-conforming advertising signs from residential districts in which such commercial uses are incompatible, has no relationship to the stated purpose for the Federal Highway Beautification Act’s regulation of advertising signs, which is “to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty”; thus, the Board finds the Appellant’s reliance on the Federal Highway Beautification Act to be misguided; and

WHEREAS, the Board further notes that the Appellant has provided no evidence that the Federal Highway Beautification Act should apply to the regulation of the Sign, where DOB’s enforcement results from the location of the Sign in a residential districts and not its proximity to any

federal roads or controlled highways; and

WHEREAS, as noted above, in addition to the ten-year amortization period provided under ZR § 52-731, the Appellant has enjoyed the benefit of the Sign for more than 40 years past the December 15, 1971 date when any sign at the site should have been terminated; and

WHEREAS, accordingly, the Board finds that DOB properly rejected the Sign from registration.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determination of the Department of Buildings, dated May 9, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, February 5, 2013.

169-12-A & 170-12-A

APPLICANT – Davidoff Hatcher & Citron LLP, for Lamar Advertising of Penn LLC.

OWNER OF PREMISES – 26-28 Market Street, Inc.

SUBJECT – Application June 7, 2012 – Appeal from Department of Buildings’ determination that signs are not entitled to continued non-conforming use status as advertising signs, pursuant to Z.R. §52-731. R7-2 zoning district.

PREMISES AFFECTED – 24-28 Market Street, southeast intersection of Market Street and Henry Street, Block 275, Lot 20, Borough of Manhattan.

COMMUNITY BOARD #3M

ACTION OF THE BOARD – Appeal Denied.

THE VOTE TO GRANT –

Affirmative:0

Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez4

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to Notice of Sign Registration Rejection letters from the Manhattan Borough Commissioner of the Department of Buildings (“DOB”), dated May 9, 2012, denying Application Nos. 10039802 and 10039701 from registration for two signs at the subject site (the “Final Determinations”), which read, in pertinent part:

The Department of Buildings is in receipt of additional documentation submitted in response to the Deficiency Letter from the Signs Enforcement Unit and in connection with the application for registration of the above-referenced sign. Unfortunately, we find this documentation inadequate to support the registration of the sign and as such, the sign is rejected from registration. This sign will be subject to enforcement action 30 days from the issuance of this letter; and

WHEREAS a public hearing was held on this application on December 11, 2012, after due notice by publication in *The City Record*, and then to decision on February 5, 2013; and

WHEREAS, the premises and surrounding area had a

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site and neighborhood examination by Chair Srinivasan; and

WHEREAS, the subject site is located at the southeast corner of Market Street and Henry Street, in an R7-2 zoning district; and

WHEREAS, the site was previously within a C8-4 zoning district which was rezoned to the current R7-2 zoning district pursuant to a rezoning on August 20, 1981; and

WHEREAS, the site is occupied by a building with a rooftop sign structure supporting two advertising signs with dimensions of 14'-0" high by 48'-0" wide (672 sq. ft.) each; one sign faces southeast, and one sign faces northwest (the "Signs"); and

WHEREAS, the Signs are located approximately 27 feet from and within view of the Manhattan Bridge and approach, a designated arterial highway pursuant to Zoning Resolution Appendix H; and

WHEREAS, this appeal is brought on behalf of the owner of the Sign (the "Appellant"); and

WHEREAS, the Appellant seeks a reversal of DOB's rejection of its sign registrations based on its assertion that (1) ZR § 52-731 has no application to lawful, non-conforming uses that predate its adoption; and (2) the application of ZR § 52-731 would result in an unconstitutional taking of property; and

WHEREAS, DOB appeared and made submissions in opposition to this appeal; and

REGISTRATION REQUIREMENT

WHEREAS, under Local Law 31 of 2005, the New York City Council enacted certain amendments to existing regulations governing outdoor advertising signs; and

WHEREAS, the amendments are codified under Articles 501, 502, and 503 of the 2008 Building Code and were enacted to provide DOB with a means of enforcing the sign laws where signs had been erected and were being maintained without a valid permit; and

WHEREAS, pursuant to Article 502 (specifically, Building Code § 28-502.4), an outdoor advertising company is required to submit to DOB an inventory of:

all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet [60.96 m] from and within view of a public park with an area of ½ acre (5000 m) or more; and

WHEREAS, further, Local Law 31 authorized the Commissioner of DOB to promulgate rules establishing permitting requirements for certain signs; the DOB rules, enacted under Rule 49, provide specific procedures for registration of advertising signs; Rule 49-15(5) reads in pertinent part:

Each sign shall be identified as either "advertising" or "non-advertising." To the extent a sign is a non-conforming sign, it must further be identified as "non-conforming advertising" or "non-conforming non-advertising." A sign

identified as "non-conforming advertising" or "non-conforming non-advertising" shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter; and

WHEREAS, subchapter B of Rule 49 (Registration of Outdoor Advertising Companies), (specifically, Rule 49-15(d)(15)(b)), sets forth the acceptable forms of evidence to establish the size and the existence of a non-conforming sign on the relevant date set forth in the Zoning Resolution; and

WHEREAS, the acceptable forms of evidence set forth at Rule 49 are, in pertinent part as follows:

Acceptable evidence may include permits, sign-offs of applications after completion, photographs and leases demonstrating that the non-conforming use existed prior to the relevant date; and

WHEREAS, affidavits are also listed as an acceptable form of evidence; and

WHEREAS, a guidance document provided by DOB sets forth the instructions for filing under Rule 49 and asserts that any one of the following documents would be acceptable evidence for sign registration pursuant to Rule 49: (1) DOB -issued permit for sign erection; (2) DOB-approved application for sign erection; (3) DOB dockets/permit book indicating sign permit approval; and (4) publicly catalogued photograph from a source such as NYC Department of Finance, New York Public Library, Office of Metropolitan History, or New York State Archives; and

REGISTRATION PROCESS

WHEREAS, the parties agree that prior to September 29, 2011, the Appellant submitted Sign Registration Applications for the Signs; and

WHEREAS, on September 29, 2011, DOB notified the Appellant that its Sign Registration Applications failed to establish any basis for the sign to remain, and requested proof that the Signs complied with ZR § 52-731; and

WHEREAS, on February 29, 2012, the Appellant responded that the Signs were legal non-conforming uses which pre-dated the adoption of ZR § 52-731 and therefore it was not applicable to the Signs; and

WHEREAS, by letter dated May 9, 2012, DOB issued the determination which forms the basis of the appeal, stating that it found the "documentation inadequate to support the registration and as such the sign is rejected from registration;" and

RELEVANT STATUTORY PROVISIONS

ZR § 52-11

General Provisions

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

* * *

ZR § 52-731

Advertising signs

In all #Residence Districts#, a #non-conforming advertising sign# may be continued for ten years after December 15, 1961, or such later date that such #sign# becomes #non-conforming#,

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providing that after the expiration of that period such #non-conforming advertising sign# shall terminate.

* * *

Building Code § 28-502.4 – Reporting Requirement

An outdoor advertising company shall provide the department with a list with the location of signs, sign structures and sign locations under the control of such outdoor advertising company in accordance with the following provisions:

- (1) The list shall include all signs, sign structures and sign locations located (i) within a distance of 900 linear feet (274 m) from and within view of an arterial highway; or (ii) within a distance of 200 linear feet (60 960 mm) from and within view of a public park with an area of ½ acre (5000 m) or more...

* * *

RCNY § 49-15 – Sign Inventory to be Submitted with Registration Application

...(d)(5) Each sign shall be identified as either “advertising” or “non-advertising.” To the extent a sign is a non-conforming sign, it must further be identified as “non-conforming advertising” or “non-conforming non-advertising.” A sign identified as “non-conforming advertising” or “non-conforming non-advertising” shall be submitted to the Department for confirmation of its non-conforming status, pursuant to section 49-16 of this chapter.

* * *

RCNY § 49-16 – Non-conforming Signs

(a) With respect to each sign identified in the sign inventory as non-conforming, the registered architect or professional engineer shall request confirmation of its non-conforming status from the Department based on evidence submitted in the registration application. The Department shall review the evidence submitted and accept or deny the request within a reasonable period of time. A sign that has been identified as non-conforming on the initial registration application may remain erected unless and until the Department has issued a determination that it is not non-conforming...

* * *

RCNY § 49-43 – Advertising Signs

Absent evidence that revenue from the sign is clearly incidental to the revenue generated from the use on the zoning lot to which it directs attention, the following signs are deemed to be advertising signs for the purposes of compliance with the Zoning Resolution:

- (a) Signs that direct attention to a business on the zoning lot that is primarily operating a storage or warehouse use for business activities conducted off the zoning lot, and that storage or warehouse use occupies less than the full

- building on the zoning lot; or
- (b) All signs, other than non-commercial, larger than 200 square feet, unless it is apparent from the copy and/or depictions on the sign that it is used to direct the attention of vehicular and pedestrian traffic to the business on the zoning lot; and

THE APPELLANT’S POSITION

WHEREAS, the Appellant contends that the Final Determinations should be reversed because (1) ZR § 52-731 has no application to lawful, non-conforming uses that predate its adoption; and (2) the application of ZR § 52-731 would result in an unconstitutional taking of property; and

1. Legal Precedent Supports the Continuation of Pre-Existing Non-Conforming Uses

WHEREAS, the Appellant asserts that the Signs were lawfully established prior to the adoption of ZR §52-731, and therefore such section does not apply to the Signs; and

WHEREAS, the Appellant notes that a permit for the Signs was issued by DOB in 1934; and

WHEREAS, the Appellant cites to Toys-R-Us v. Silva, 89 N.Y.2d 411, 421 (1996) for the principle that “zoning restrictions, being in derogation of common law property rights, [are] strictly construed and any ambiguity [is] resolved in favor of the property owner”; and

WHEREAS, the Appellant asserts that the Zoning Resolution protects the continued use of non-conforming signs since “[i]t is the law of this state that non-conforming uses or structures, in existence when a zoning ordinance is enacted, are, as a general rule, constitutionally protected and will be permitted to continue, notwithstanding contrary provisions of the [zoning] ordinance.” Costa v. Callahan, 41 A.D. 3d 1111, 1113 (3d Dept. 2007), citing Matter of Rudolf Steiner Fellowship Found v. DeLuccia, 90 N.Y.2d 453, 463 (1997); and

WHEREAS, the Appellant argues that statutes are to be construed prospectively and not retrospectively unless otherwise provided (See In re Town of Islip v. Caviglia, 73 N.Y.2d 544, 560-61 (1989)), and that unlike the statute at issue in Caviglia, the Appellant asserts that ZR § 52-731 is not content-neutral since it is exclusively directed to advertising signs and not any other manner of signs, and, accordingly, the general rule of prospective construction of statutes should apply; and

WHEREAS, the Appellant claims that the subject case is distinguishable from the authorities previously relied upon by the Board in upholding the applicability of ZR § 52-731; and

WHEREAS, specifically, the Appellant asserts that (1) in 550 Halstead Corp. v. Zoning Bd. of Appeals, 1 N.Y.3d 561, 562 (2003) the non-conforming use was expanded and extended contrary to the local ordinance, whereas in this case the use as advertising signs pursuant to permits has remained constant, and (2) in Off Shore Restaurant Corp. v. Linden, 30 N.Y.2d 160 (1972), there was a clear change in use from a delicatessen to a cocktail lounge, thus requiring

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compliance with the municipal off-street parking requirement; and

WHEREAS, accordingly, the Appellant contends that since the statute at issue was adopted in 1963, after the non-conforming use status of the Signs, permitted in 1934, were established, it cannot be applied with respect to the Signs; and

2. DOB's Enforcement of the Signs would be an Unconstitutional Taking

WHEREAS, the Appellant asserts that the application of ZR § 52-731 would result in an unconstitutional taking of property in violation of the Fifth Amendment; and

WHEREAS, the Appellant contends that amortization provisions, such as the one set forth in ZR § 52-731, do not provide just compensation for the taking of a lawful advertising sign use consistent with the taking clause of the Fifth Amendment, which states: "...nor shall private property be taken for public use without just compensation;" and

WHEREAS, the Appellant argues that the Federal Highway Administration ("FHWA") has provided clear guidance on this issue, and has expressly determined that the removal of legal advertising signs (such as those at issue on these appeals) located on federal roads or controlled highways pursuant to the Highway Beautification Act, 23 U.S.C. 131, requires the payment of just compensation to the owner of such advertising signs; and

WHEREAS, the Appellant asserts that Congress has repeatedly rejected the amortization of lawful advertising sign uses and amended the Highway Beautification Act in 1978 to clarify that "just compensation shall be paid upon the removal" of such advertising signs; and

WHEREAS, the Appellant further asserts that, as recently as 2006, FHWA confirmed as part of a national assessment of advertising sign control programs that amortization of sign uses is no longer an issue because of the settled principle that cash compensation must be paid in connection with such takings, and that in response to efforts by those seeking the removal of non-conforming advertising signs, FHWA noted: "some continue to advocate amortization as a means to accomplish this, but widespread use of this approach was effectively prohibited by Federal legislation;" and

WHEREAS, the Appellant argues that DOB is relying on a statute that merely provided the owners and operators of lawfully established signs a period of years to continue such operations, without regard for any cash compensation for such takings; and

WHEREAS, accordingly, the Appellant asserts that ZR § 52-731 is inconsistent with Federal guidance on this issue and, if applied as DOB intends, will impose a significant deprivation of the Appellant's constitutional rights; and

DOB'S POSITION

WHEREAS, DOB asserts that zoning regulations prohibit the Signs in the subject R7-2 zoning district, as set forth at ZR § 22-30, which does not include advertising signs among the permitted uses; and

WHEREAS, DOB states that non-conforming advertising signs are permitted in residential zoning districts only when they comply with Chapter 2 of Article 5 of the Zoning Resolution; and

WHEREAS, specifically, DOB cites to ZR § 52-11, which states that "a non-conforming use may be continued, except as otherwise provided in this Chapter;" and

WHEREAS, DOB continues by citing ZR § 52-731, which expressly provided a limitation on the use of non-conforming advertising signs in residential zoning districts; the original text states that:

[i]n all Residence Districts, a non-conforming advertising sign may be continued for eight years after the effective date of this resolution or such later date that such sign becomes non-conforming, provided that after the expiration of that period such non-conforming advertising sign shall terminate; and

WHEREAS, DOB notes that on August 22, 1963, the original ZR § 52-731 was amended to allow a ten-year, rather than an eight-year, amortization period; the 1963 version of the text, allowing for a ten-year amortization period remains in effect today; and

WHEREAS, DOB states that in order to maintain the Signs, the Appellant must demonstrate that: (1) the Signs are non-conforming (a lawful pre-existing non-conforming use, as defined at ZR § 12-10) and (2) it has been less than ten years since the Signs became non-conforming; and

WHEREAS, DOB states that the lawful use must have been established on December 15, 1961 or at the time of a relevant zoning amendment; and

WHEREAS, DOB notes that the Appellant has submitted proof of a permit issued by DOB in 1933 for a roof sign structure and for electric sign permits issued by DOB in 1979, two years prior to the date the site was rezoned from C8-4 to R7-2; and

WHEREAS, DOB asserts that even assuming that the Signs existed lawfully on August 20, 1981, they became "non-conforming" on that date since the site was rezoned to R7-2; therefore, on August 20, 1981, the ten-year amortization period set forth in ZR § 52-731 began to run and the Signs were required to be removed no later than August 20, 1991; and

WHEREAS, accordingly, DOB asserts that its rejection of the sign registrations are appropriate because the Signs do not comply with ZR § 52-731; and

CONCLUSION

WHEREAS, the Board agrees with DOB that the language of ZR § 52-731 is clear and requires that because any advertising sign at the site became a non-conforming use on August 20, 1981 when it was mapped to be within an R7-2 zoning district, such use should have been terminated by August 20, 1991; and

WHEREAS, the Board agrees with DOB that even if the Appellant were to establish that the Signs were lawfully non-conforming at the relevant dates, the question is moot since even a lawfully non-conforming sign would have to have been

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terminated on or before August 20, 1991; and

WHEREAS, accordingly, the Board finds that the advertising sign use should have been terminated on or before August 20, 1991, pursuant to ZR § 52-731; and

WHEREAS, the Board notes that the ZR § 12-10 definition of non-conforming use and ZR § 52-731 contemplate prospective enforcement in that uses that were rendered non-conforming on December 15, 1961 (like the subject Sign) were able to remain for ten years so long as they were lawful on December 15, 1961 (per ZR § 12-10); and

WHEREAS, the Board notes that the adoption of the 1961 Zoning Resolution did not prohibit the continuance of non-conforming uses, but rather newly non-conforming uses were able to exist in derogation of the Zoning Resolution, but only for a specified period; and

WHEREAS, as to the applicability of statutes adopted after a use has been established, the Board notes that per the Court of Appeals, municipalities may adopt laws regarding previously existing nonconforming uses. 550 Halstead Corp., 1 N.Y.3d at 562; Matter of Toys "R" Us v Silva, 89 N.Y.2d 411, 417, (1996); and

WHEREAS, specifically, the Board notes that the Court of Appeals has held that, “[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and eventual elimination[,]” and “municipalities may adopt measures regulating nonconforming uses and may, in a reasonable fashion, eliminate them.” 550 Halstead Corp., 1 N.Y.3d at 562; and

WHEREAS, further, the Board notes that in Off Shore Restaurant Corp., the Court stated, “the courts do not hesitate to give effect to restrictions on non-conforming uses . . . It is because these restrictions flow from a strong policy favoring the eventual elimination of nonconforming uses” 30 N.Y.2d at 164; and

WHEREAS, the Board finds that, despite the Appellant’s attempt to distinguish the facts of 550 Halstead Corp. and Off Shore Restaurant Corp. from those of the subject case, the cited cases are relevant with regard to the above-mentioned holdings pertaining to the regulation of non-conforming uses; and

WHEREAS, the Board notes that ZR § 52-731 is not contrary to ZR § 52-11, which states that “a nonconforming use may be continued, except as otherwise provided in [Chapter 2]” because the Board notes that non-conforming uses are protected by Article V, but, as anticipated at ZR § 52-11, there are limiting conditions; and

WHEREAS, the Board finds that the Appellant has failed to provide evidence that its purported satisfaction of the Sign Registration requirement supersedes the clear, undisputed text of the Zoning Resolution; and

WHEREAS, as to the Appellant’s assertion that the application of ZR § 52-731 would amount to a regulatory taking, the Board disagrees with the Appellant that the application of zoning regulations constitutes a taking; however, the Board finds that to the extent ZR § 52-731

does constitute an unconstitutional takings action, any such claim is properly directed against the statute itself, rather than DOB’s enforcement of the statute, and such a claim is more appropriately addressed in a different forum; and

WHEREAS, the Board disagrees with the Appellant’s reliance on the Federal Highway Beautification Act, which regulates advertising signs located within 660 feet of federal roads or controlled highways, and distinguishes that statute from ZR § 52-731, which prohibits advertising signs in residential districts regardless of the proximity of such signs to an arterial or highway; and

WHEREAS, the Board notes that the purpose of ZR § 52-731, to eliminate prior non-conforming advertising signs from residential districts in which such commercial uses are incompatible, has no relationship to the stated purpose for the Federal Highway Beautification Act’s regulation of advertising signs, which is “to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty”; thus, the Board finds the Appellant’s reliance on the Federal Highway Beautification Act to be misguided; and

WHEREAS, the Board further notes that the Appellant has provided no evidence that the Federal Highway Beautification Act should apply to the regulation of the Signs, where DOB’s enforcement results from the location of the Signs in a residential districts and not their proximity to any federal roads or controlled highways; and

WHEREAS, the Board notes that in addition to the ten-year amortization period provided under ZR § 52-731, the Appellant has enjoyed the benefit of the Signs for more than 20 years past the August 20, 1991 date when any sign at the site should have been terminated; and

WHEREAS, accordingly, the Board finds that DOB properly rejected the Signs from registration.

Therefore it is resolved that the subject appeal, seeking a reversal of the Final Determinations of the Department of Buildings, dated May 9, 2012, is hereby denied.

Adopted by the Board of Standards and Appeals, February 5, 2013.

190-12-A, 191-12-A & 192-12-A

APPLICANT – Davidoff Hatcher & Citron, LLP, for Fuel Outdoor LLC.

OWNER OF PREMISES – JRR Realty Co., Inc.

SUBJECT – Application June 13, 2012 – Appeals from Department of Buildings’ determination that signs are not entitled to continued legal status as advertising sign. M1-4 zoning district.

PREMISES AFFECTED – 42-45 12th Street, north of Northeast corner of 12th Street and 43rd Street, Block 458, Lot 83, Borough of Queens.

COMMUNITY BOARD #2Q

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4
Negative:.....0

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Absent: Commissioner Ottley-Brown.....1
ACTION OF THE BOARD – Laid over to March 19, 2013, at 10 A.M., for decision, hearing closed.

197-12-A

APPLICANT – Davidoff Hutcher & Citron LLP, for Interstate Outdoor Advertising.

OWNER OF PREMISES – Hamilton Plaza Associates.

SUBJECT – Application June 21, 2012 –Appeal from Department of Buildings' determination that sign is not entitled to continued non-conforming use status as advertising sign. M1-2/M2-1 zoning district.

PREMISES AFFECTED – 1-37 12th Street, east of Gowanus Canal between 11th Street and 12th Street, Block 10007, Lot 172, Borough of Brooklyn.

COMMUNITY BOARD #7BK

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to March 19, 2013, at 10 A.M., for decision, hearing closed.

203-12-A

APPLICANT – Davidoff Hutcher & Citron LLP, for CBS Outdoor, Inc.

OWNER OF PREMISES – Gemini 442 36th Street H LLC.

SUBJECT – Application June 28, 2013 – Appeal from Department of Buildings' determination that sign is not entitled to continued non-conforming use status as advertising sign. C2-5 /HY Zoning District

PREMISES AFFECTED – 442 West 36th Street, east of southeast corner of 10th Avenue and 36th Street, Block 733, Lot 60, Borough of Manhattan.

COMMUNITY BOARD #4M

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to March 19, 2013, at 10 A.M., for decision, hearing closed.

Jeff Mulligan, Executive Director

Adjourned: P.M.

REGULAR MEETING TUESDAY AFTERNOON, FEBRUARY 5, 2013 1:30 P.M.

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

Absent: Commissioner Ottley-Brown.

ZONING CALENDAR

147-11-BZ

CEQR #12-BSA-025Q

APPLICANT – Sheldon Lobel, P.C., for Savita and Neeraj Ramchandani, owners.

SUBJECT – Application September 16, 2011 – Variance (§72-21) to permit the construction of a single-family, semi-detached residence, contrary to floor area (§23-141) and side yard (§23-461) regulations. R3-2 zoning district.

PREMISES AFFECTED – 24-47 95th Street, east side of 95th Street, between 24th and 25th Avenues, Block 1106, Lot 44, Borough of Queens.

COMMUNITY BOARD #3Q

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the decision of the Queens Borough Commissioner, dated November 15, 2012, and acting on Department of Buildings Application No. 4809110 reads, in pertinent part:

1. Proposed floor area ratio exceeds maximum permitted under ZR Section 23-141; and
2. Proposed side yard does not comply with ZR Section 23-461; and
3. Proposal does not comply with parking requirements under ZR Section 25-22; and

WHEREAS, this is an application under ZR § 72-21, to permit, within an R3-2 zoning district, the construction of a new single-family semi-detached home that exceeds the permitted floor area and floor area ratio (“FAR”) and does not provide the required side yards or parking, contrary to ZR §§ 23-141, 23-461, and 25-22; and

WHEREAS, a public hearing was held on this application on July 10, 2012, after due notice by publication in *The City Record*, with continued hearings on August 14, 2012, September 11, 2012, October 23, 2012, November 27, 2012, and January 8, 2013, and then to decision on February 5, 2013; and

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

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Commissioner Ottley-Brown; and

WHEREAS, Community Board 3, Queens, recommends approval of this application; and

WHEREAS, the adjacent neighbor to the north, represented by counsel, provided oral and written testimony raising concerns with the improper grading and drainage problems on the subject site and the poor condition of the site, and requesting that the proposed home align with the adjacent home to avoid negative impacts on the neighbor's light and air; and

WHEREAS, the site is located on the east side of 95th Street between 24th Avenue and 25th Avenue; and

WHEREAS, the site has a width of approximately 19'-6", a depth of 95'-0", a total lot area of approximately 1,847 sq. ft., and is located within an R3-2 zoning district; and

WHEREAS, the site is currently vacant but was previously occupied by a semi-detached house, which the applicant states is believed to have been destroyed by a fire; and

WHEREAS, the applicant proposes to construct a two-story single-family semi-detached home with the following parameters: a floor area of 1,263 sq. ft. (0.68 FAR) (0.50 FAR is the maximum permitted); a side yard with a width of 5'-0" along the southern lot line (a minimum side yard width of 8'-0" is required for semi-detached homes); and no parking spaces (a minimum of one parking space is required); and

WHEREAS, the applicant initially proposed to construct a home with a parking space located in the front yard, which resulted in the proposed home not being aligned with the adjacent home to the north; and

WHEREAS, at the direction of the Board, and in response to concerns raised by the adjacent neighbor, the applicant revised its proposal to align the proposed home with the adjacent home to the north; and

WHEREAS, because the proposed home does not comply with the underlying R3-2 district regulations, a variance is requested; and

WHEREAS, the applicant states that the following are unique physical conditions, which create practical difficulties and unnecessary hardship in developing the subject site in compliance with underlying zoning regulations: the site's narrow width; and

WHEREAS, the applicant states that the lot has a width of approximately 19'-6"; and

WHEREAS, the applicant states that providing a complying side yard of 8'-0" would result in a 11'-6" wide home, with even narrower interior dimensions given the widths of the walls, which would not be viable; and

WHEREAS, the applicant further states that, given the size of the lot, the maximum FAR of 0.50 would result in a single-family home with 920 sq. ft. of floor area, and small, inefficient floor plates of 460 sq. ft.; and

WHEREAS, therefore, the applicant requires a side yard waiver to allow for a new home with a width of 14'-6" and a floor area waiver to allow for a home with a floor area of 1,263 sq. ft. (0.68 FAR), to provide a floor plate that results in a habitable home; and

WHEREAS, the applicant states that due to the narrow width of the lot it cannot provide an accessory parking space in what would normally be a side lot ribbon; and

WHEREAS, as to the uniqueness of the lot, the applicant states that the site is the narrowest tax lot on either side of 95th Street between 24th Avenue and 25th Avenue, where all other parcels are 20 feet or wider; and

WHEREAS, the applicant represents that the typical separation between the other semi-detached homes in the surrounding area is 8'-0", often shared between the two adjacent parcels, while the subject site will have a proposed separation between homes of approximately 14'-5" because the adjacent detached home has a side yard/driveway ribbon with a width of 9'-8"; and

WHEREAS, the applicant also provided an analysis of lots within 400 feet of the site with a width of 20'-0" or less, which reflects that of the 124 lots within 400 feet, 47 have a width of 20'-0" or less; and

WHEREAS, the lot study provided by the applicant further shows that the FARs of the homes with a width of 20'-0" or less range from 1.62 to 0.46, and the 40 of these lots (or 82 percent) are improved with residential buildings that have FARs greater than 0.68; and

WHEREAS, the applicant concludes that the requested waivers of floor area, FAR and side yard requirements are necessary to develop the site with a habitable home; and

WHEREAS, based upon the above, the Board finds that the cited unique physical conditions create practical difficulties in developing the site in strict compliance with the applicable zoning regulations; and

WHEREAS, the Board has determined that because of the subject lot's unique physical conditions, there is no reasonable possibility that compliance with applicable zoning regulations will result in a habitable home; and

WHEREAS, the applicant represents that the proposed variance will not negatively affect the character of the neighborhood, or impact adjacent uses; and

WHEREAS, the applicant notes that the proposed bulk is compatible with nearby residential development and that the height complies with zoning regulations; and

WHEREAS, the applicant submitted a 400-ft. radius diagram which reflects that the surrounding area is characterized by single-family detached and semi-detached homes; and

WHEREAS, the applicant states that the proposed variance only seeks to (1) permit a modest increase in the building's bulk (0.18 FAR), (2) allow a slight reduction in the required side yard from 8'-0" to 5'-0", and (3) waive the one required parking space; and

WHEREAS, the applicant notes that the adjacent building to the south of the site has a side yard of 9'-8", which when combined with the proposed side yard of 5'-0" creates 14'-8" of separation between buildings which exceeds the typical amount of separation between homes on the subject block; and

WHEREAS, as noted above, the lot study submitted by the applicant reflects that of the approximately 47 lots with

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widths of less than 20'-0" in the surrounding area, 40 of these lots (or 82 percent) are improved with residential buildings that have FARs greater than 0.68; and

WHEREAS, the applicant notes that most homes along 95th Street, including the subject site, have a pre-existing chain linked fence, extending the actual front yards approximately 5'-5" into the mapped street; however, the proposed home will not utilize the 5'-5" of mapped street for any zoning calculation purposes, and the home will comply with the front yard requirements as per the dimensions of the deeded lot, exclusive of the mapped street section; and

WHEREAS, as noted above, at the direction of the Board and in response to the concerns raised by the adjacent neighbor, the applicant revised the proposal to align the proposed home with the adjacent home to avoid negative impacts on the adjacent neighbor's light and air; and

WHEREAS, in response to the concerns raised by the adjacent neighbor regarding the drainage problems at the site, the applicant submitted a letter from the architect stating that the rainwater runoff at the site will be directed to the drywell to be located in the rear yard of the site, that minimal water will find its way between the homes, and that the applicant is prepared to implement a water diversion system to guide any such rainwater runoff between the homes to the rear yard drywell; and

WHEREAS, the applicant also provided photographs reflecting that the site has been cleaned of all debris and excessive growth; and

WHEREAS, the applicant states that the proposed home will align with the adjacent houses and the height of the home has been reduced to align with the future adjacent house; and

WHEREAS, therefore, 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 Board finds that the hardship herein was not created by the owner or a predecessor in title, but is a result of the historic lot dimensions; and

WHEREAS, the applicant notes that the proposed home complies with all requirements of the underlying R3-2 zoning district, with the exception of FAR, side yard, and parking; and

WHEREAS, accordingly, the Board finds that this proposal is the minimum necessary to afford the owner relief; and

WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 72-21.

Therefore it is Resolved that the Board of Standards and Appeals issues a Type II Declaration under 6 NYCRR Part 617.5 and 617.13, §§ 5-02(a), 5-02(b)(2), and 6-15 of the Rules of Procedure for City Environmental Quality Review, and makes the required findings under ZR § 72-21 to permit, within an R3-2 zoning district, the construction of a new single-family semi-detached home that exceeds the permitted FAR and does not provide the required side yards or parking, contrary to ZR §§ 23-141, 23-461, and 25-22; *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 January 24, 2013"--(7) sheets; and *on further condition:*

THAT the parameters of the proposed building shall be as follows: a maximum floor area of 1,263 sq. ft. (0.68 FAR); a side yard of with a minimum width of 5'-0" along the southern lot line; a front yard with a depth of 15'-0"; a rear yard with a depth of 35'-11 3/8"; a total height of 26'-6", and no parking spaces, as per the BSA-approved plans; THAT there shall be no habitable room in the cellar;

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;

THAT significant construction shall proceed in accordance with ZR § 72-23;

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 5, 2013.

12-12-BZ

CEQR #12-BSA-068M

APPLICANT – Greenberg Traurig, LLP by Deirdre A. Carson, Esq., for 100 Varick Realty, LLC, AND 66 Watts Realty LLC, owners.

SUBJECT – Application January 19, 2012 – Variance (§72-21) for a new residential building with ground floor retail, contrary to use (§42-10) and height and setback (§§43-43 & 44-43) regulations.

PREMISES AFFECTED – 100 Varick Street, east side of Varick Street, between Broome and Watts Streets, Block 477, Lot 35, 42, 44 & 76, Borough of Manhattan.

COMMUNITY BOARD #2M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated January 5, 2012, acting on Department of Buildings Application No. 120084719, reads, in pertinent part:

1. ZR 42-10 – Proposed residential use within manufacturing (M1-6) zoning district is not permitted.
2. ZR 43-43 – Proposed building does not comply with front wall heights and setback

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requirements, hence is not permitted.

3. ZR 44- – Proposed curb cut is located within 50 feet of the intersection of two streets, hence is not permitted; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site within an M1-6 zoning district, a 13-story residential building, with 96 dwelling units, commercial use on the first floor, and a curb cut within 50 feet of the intersection, which is contrary to ZR §§ 42-10, 43-43, and 44-582; and

WHEREAS, a public hearing was held on this application on June 19, 2012, after due notice by publication in the *City Record*, with continued hearings on August 7, 2012, September 11, 2012, and October 30, 2012, and then to decision on February 5, 2013; and

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

WHEREAS, Community Board 2, Manhattan, recommends disapproval of the initial iteration of this application with the suggestion that the development of the site be addressed after the pending the Department of City Planning's Hudson Square Rezoning is finalized and that any plans substantively comply with the new zoning; and

WHEREAS, The Door Youth Development Services submitted testimony in opposition to the proposal, citing concerns about (1) the placement of the curb cut, (2) poor site maintenance, and (3) a decision before the Rezoning being premature; and

WHEREAS, the neighbor at 64 Watts Street provided written and oral testimony in opposition to the proposal, citing concerns about whether (1) the hardship had been established and all premium costs are justified, (2) the site conditions are unique, (3) a lesser variance (7.2 FAR) would be sufficient to overcome any hardship, (4) the scale of the proposal is compatible with neighborhood character, and (5) sufficient measures will be performed during and after construction to protect the adjacent building; and

WHEREAS, the subject premises is located on the east side of Varick Street between Watt and Broome streets, across the street from the Hudson Tunnel entry plaza, and is comprised of four tax lots - Lots 35, 42 (1999 acquisitions), 44, and 76 (2006 and 2007 acquisitions); the assembled site has frontage of 171.41 feet along Varick Street, 56'-3 ¾" along Broome Street and 55 feet along Watts Street, with a total lot area of 9,576 sq. ft.; and

WHEREAS, under the prior application, the site is the subject of a prior variance, dated August 8, 2006, under BSA Cal. No. 151-05-BZ for an eight-story building with 7.97 FAR and a height of 78'-9"; and

WHEREAS, the site before the Board was only lots 35 and 42 and was subject to a private agreement, with 125 Varick Street (and another nearby property) which restricted the building height to 80 feet above the level of the sidewalk of Varick Street (the "Height Limitation Agreement"); and

WHEREAS, the applicant states that subsequent to the Board's 2006 grant, it reached an agreement with its neighbors to eliminate the height agreement and, separately, purchased Lots 44 and 76; and

WHEREAS, the applicant then applied to DOB in 2009 and was approved to construct a hotel at the site as-of-right, but determined that such a proposal was not economically feasible; and

WHEREAS, the current application began with the applicant proposing a 14-story building with a total floor area of 95,760 sq. ft. (10 FAR) including residential 9.19 FAR, with a base that fully occupied the lot and would have risen without setback to the roof over the twelfth floor, at an elevation of 145 feet; it would then have set back 12 feet on Watts Street and 13 feet on Broome Street at that level and would have achieved a partial setback along the Varick Street frontage of 8 feet; the top two floors of the building would have achieved the final building height of 169 feet; the original proposal penetrated the sky exposure plane and encroached on the required setback at 85 feet on all three street frontages; and it included parking on a portion of the first floor (and a curbcut within 50 feet of an intersection, which was non-compliant with ZR § 44-43); and

WHEREAS, the applicant also originally sought in a companion application (BSA Cal. No. 110-12A) pursuant to Multiple Dwelling Law (MDL) § 310(2)(c) to permit certain rooms in dwelling units in the new building to obtain their light and air from windows that do not face upon a legal yard, court or area above a setback on the same zoning lot, contrary to MDL §§ 26(7)(a) and 30(2); and

WHEREAS, during the public hearing process, in response to comments received from the Board indicating that it would not support a new residential building with a total 10 FAR the applicant redesigned the proposed building to reduce its proposed FAR and to reorganize the configuration of the building; as modified, the proposal reflects 13 stories in a total height of 154 feet, with 96 dwelling units ranging in size from 530 sq. ft. to 1,030 sq. ft.; and two retail stores on the ground floor; and

WHEREAS, at the Board's direction, the applicant redesigned the building to comply with MDL requirements and ultimately withdrew the companion MDL application; and

WHEREAS, the new building has a total floor area of 76,608 sq. ft. with a resulting FAR of 8, of which 4,600 sq. ft. will be commercial (0.48 FAR) and 72,008 sq. ft. (7.52 FAR) will be residential; and

WHEREAS, the revised proposal provides a 17-ft. wide outer court along the Watts Street frontage, running north/south a distance of approximately 116 feet; the building rises without setback to the roof over the eleventh floor, at an elevation of 132 feet along both the Varick Street and Broome Street frontages; the building provides setbacks of 15 feet from the street line on each of Watts and Broome Streets and seven feet from the street line along the Varick Street frontage; the new building penetrates the existing sky exposure plane and encroaches on the required setback at 85 feet on all three street frontages; and

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WHEREAS, the applicant now seeks relief in the form of a use and several bulk variances pursuant to ZR § 72-21 to permit: (1) residential use in the building, which is contrary to ZR §§ 42-11, 42-12 and 42-13; (2) encroachment on the setback that would ordinarily be required at 85'-0" and penetration of the sky exposure plane, contrary to ZR § 43-43; and (3) a curb cut that is within 50 feet of the corner of the intersection of Broome and Varick Streets, contrary to ZR § 44-582 for the proposed loading berth, rather than for parking; and

WHEREAS, accordingly, the owner now seeks a use variance from the Board, which would permit the construction of the proposed residential building; and

WHEREAS, the applicant states that the following are unique physical conditions which create an unnecessary hardship in developing the site in conformance with applicable regulations: (1) the size and shape of the site and the presence of an alley easement along the eastern lot line; (2) poor soil conditions, a high water table, and the existence of rubble stone foundations on the adjacent property; (3) the presence of the Seventh Avenue subway along the Varick Street frontage; and (4) the testing and potential remediation of a buried gasoline tank; and

WHEREAS, as to the site's size and shape, the applicant states that the dimensions are 171 feet by 55 feet, with an alley easement along the eastern lot line which constrain as of right construction; and

WHEREAS, the applicant states that the presence of the historic alley, entered from Watts Street and wrapped around behind the four remaining three-story buildings fronting on Watts and terminating at a point inside the site, distorts what would otherwise have been a nearly rectangular lot; and

WHEREAS, the applicant states that the alley projects a distance of approximately 7'-6" into the interior of the lot at the rear and that it does not appear from the available records that the alley is owned by any one property owner on the block and, barring litigation to quiet title, must be maintained for the use of all property owners whose land touches the alley; and

WHEREAS, the applicant states that these conditions only allow for a single-loaded corridor (resulting in an inefficient floor plate) and a building aspect ratio in excess of 3 (creating significant engineering difficulties for shear wall design); and

WHEREAS, further, the applicant states that the narrowness of the site and the existence of the notch along the eastern property line, along with the subsurface conditions which the engineers for the project are required to manage (including the adjacency of the subway and rubble wall foundation) and the high building aspect ratio collectively result in significant inefficiencies in the building layout and in significant premium costs for the design and construction of foundations and superstructure; and

WHEREAS, the applicant asserts that it analyzed two options when considering constructing a complying hotel: the first was a standard complying scenario setting back

above the sixth story and the second was a tower, as reflected in the conforming and complying scenario plans; in both scenarios, in order to achieve the most efficient possible layout, taking into account the presence of the notch, the elevators for the building were placed along the eastern property line; and

WHEREAS, as to the subsurface conditions, the applicant states that its engineers confronted several hardship conditions: (1) the geotechnical engineer discovered an unstable layer of peat located 17 feet to 21 feet below curb level, which led the structural engineers, to recommend drilled piles to support the structure, in order to reach stable bedrock; and (2) due to the presence of the subway tunnel along Varick Street, standard driven piles would not be viable; accordingly, a system of drilled piles, taken to bedrock at 100 feet, was initially considered but ultimately deemed cost prohibitive; and

WHEREAS, the applicant states that rather than using driven piles, the engineers designed a fully excavated foundation that required removal of the peat layer in its entirety and creation of a new stable substrata with three to four feet of crushed rock, compacted to achieve sufficient bearing capacity; the applicant states that this design necessitated excavation to a depth that was five feet greater than the depth that would have been required to accommodate a standard cellar and the four feet thick concrete mat slab that the engineers designed as the foundation alternative; and

WHEREAS, the applicant asserts that the deep excavation would be complicated by placement of the building's elevators along the eastern property line; the applicant states that the condition of the foundation of at least one of the adjacent properties is poor, because its foundations are not deep and one of the buildings has a rubble stone foundation (64 Watts Street); and

WHEREAS, the applicant asserts that special foundational requirements are necessary to protect the adjacent property on the east from the deep excavation, consisting of a secant wall system, which will act as a retaining wall at the site; and

WHEREAS, the applicant asserts that as excavation proceeds, the secant wall supports will require modification, soil compaction grouting will also be required, and in order to maneuver in the narrow site, portions of the secant wall will have to be removed as the foundation progresses, which increases the time required to pour the foundation, the number of steps in construction of each phase and, consequently, the foundation cost; and

WHEREAS, the applicant asserts that all of these elements impose a cost premium on the construction of the foundation; and

WHEREAS, further, the applicant asserts that the high water table complicates foundation construction as it is above the peat layer and at the level of the mat slab; and

WHEREAS, the applicant asserts that the high water table precludes the use of standard underpinning of the adjacent rubble wall foundation and necessitates the secant

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wall system; and that dewatering operations will also be required during excavation and foundation construction, all of which must meet the MTA's specifications; and

WHEREAS, the applicant asserts that the presence of water complicates the construction of the temporary shoring and permanent support for the adjacent building; the finished basement will require permanent drainage and waterproofing to maintain a water free environment for the life of the building, and that these factors add more premium to the cost of foundation construction; and

WHEREAS, the applicant asserts that the building aspect ratio also imposes significant additional costs as a complying building on the site is a taller building, resulting in a building aspect ratio of more than 3.8; and

WHEREAS, the applicant asserts that a building designed to comply with setback requirements would present significant problems for shear and wind loads, adding to both engineering and superstructure costs; the original tower design had two shear walls built into it: one at the elevator core and a second at the eastern wall, along the building's single corridor; and

WHEREAS, the applicant asserts that building a shorter building, in the form proposed, allows a single exterior wall to function as the shear wall for wind loading purposes; and

WHEREAS, further, the applicant asserts that if a building were to conform to required setbacks and the sky exposure plane along Varick Street, the resulting width of the building would produce a floor plate that is 40 feet deep at the point of initial setback, with additional setbacks required at the top of the building to comply with the sky exposure plane; and

WHEREAS, the applicant asserts that simultaneously, the building would be pinched in the middle by the seven-ft. incursion of the notch representing the vestigial remainder of the alley; and

WHEREAS, accordingly, the applicant asserts that the site's conditions mandate that the building have a single-loaded corridor (which is necessary even with the relief requested on this application), resulting in an inefficient floor layout; and

WHEREAS, the applicant asserts that a complying building would have a net useable to gross floor area ratio of 72.19 percent with a loss factor of nearly 28 percent while the proposed building would have a net useable to gross floor area ratio of 83 percent, reducing the loss factor to 17 percent; and

WHEREAS, the applicant asserts that the proposed building reduces premium costs, by reducing the height, the location and size of setbacks, and increasing the size of upper floors for a more efficient floor layout; and

WHEREAS, the applicant performed an analysis of the area in order to evaluate the uniqueness of its site conditions and identified all sites that would be considered soft sites for future development (including potential assemblages) in the study area, as well as sites of recent construction within the past 30 years that are within or at the edge of the 400-ft.

radius of the site; and

WHEREAS, the applicant assert that its study reflects that only the subject site was burdened by the combination of factors that give rise to the owner's claim of uniqueness in this case; none of the buildings within the radius and constructed within the past 30 years shared all of these factors; for example, the Trump Soho site, at 246 Spring Street, is outside the historic marshland shown on the Viele Map; the Hampton Hotel at 52 Watts Street is not irregular and has a building aspect ratio of only 2.5; the building at 57 Watts Street is on a large lot with a 25-story tower completed in 1992, that shares the characteristics of the site, except irregularity, but has a building aspect ratio of only 2.23; 80 Varick Street was a building constructed in the 1920's but converted to residential use pursuant to a variance granted in 1978; and 66 Charlton, at the northern edge of the Study Area, shares none of the characteristics with the site; and

WHEREAS, the applicant asserts that, similarly, none of the potential development and assemblage sites in the study area have the same combination of former marshland subsurface adjacencies with the subway on one side and a fragile rubble wall on the other, a high building aspect ratio and an irregular lot; and

WHEREAS, the applicant asserts that with respect to the request for waiver to the regulations prohibiting curb cuts within 50 feet of a corner, the owner has no option to provide an alternative, given the shallow depth from Varick Street; and

WHEREAS, the applicant represents that DOB approved the curbcut associated with the as-of-right hotel project, under its authority and that it could seek DOB's authority to do so for the proposed residential building, but has included the waiver request as part of the variance application; and

WHEREAS, finally, the applicant asserts that there is likely but unknown mitigation associated with the underground storage tanks that have never been removed and may have been affected by the high water table; no record exists that these tanks, installed long before either the state or federal government imposed any significant regulation on underground storage tanks, were ever closed or removed when the site was redeveloped (without a basement or cellar) in the early 1960's; and

WHEREAS, the applicant states that the environmental consultant estimates that remediation costs associated with these tanks could run from as low as \$50,000 to study and remove (if there have been no leaks) to \$1,000,000, if the tanks leaked into the water table and the plume migrated off-site; and

WHEREAS, the Board does not view the foundation conditions on the adjacent site to be a unique condition and it cannot credit the supposition that there is contamination at the site, without any evidence; and

WHEREAS, however, the Board does view the configuration of the site, the subsurface conditions (including high water table), and the presence of the subway as legitimate

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unique physical conditions, in the aggregate; and

WHEREAS, based upon its review of the submitted radius diagram and its site and neighborhood inspection, the Board observes that the conditions in the aggregate are relatively unique within the area; and

WHEREAS, based upon the above, the Board finds that the site conditions create unnecessary hardship and practical difficulty in developing the site in conformance with the applicable zoning regulations; and

WHEREAS, the applicant initially submitted a feasibility study analyzing: (1) an as-of-right hotel, (2) a complying residential scenario, and (3) the original proposal for a 10 FAR residential building; and

WHEREAS, the applicant determined that only the original proposal for a 10 FAR residential building would realize a reasonable rate of return; and

WHEREAS, the applicant asserts that although all of its proposed scenarios assumed that the Height Limitation Agreement had been extinguished, none included the actual cost paid to other parties to extinguish the agreement; and

WHEREAS, at hearing, the Board directed the applicant to analyze an 8.0 FAR and 7.52 FAR lesser variance alternative for a residential building; and

WHEREAS, after revising its methodology, at the Board's direction, to consider a comparison of capitalized net operating income to development costs, rather than a return on equity, the feasibility study reflected that the proposed 8.0 FAR alternative would realize a reasonable rate of return, but the 7.52 FAR alternative would not; and

WHEREAS, based upon its review of the subsequent submissions, the Board has determined that because of the site's unique physical conditions, there is no reasonable possibility that development in strict conformance with applicable zoning requirements will provide a reasonable return; and

WHEREAS, the applicant represents that the proposed building will not alter the essential character of the neighborhood, will not substantially impair the appropriate use or development of adjacent property, and will not be detrimental to the public welfare; and

WHEREAS, the applicant states that the immediate area surrounding the site contains significant residential use, notwithstanding the manufacturing zoning classification; and

WHEREAS, the applicant specifically cites to lots on the subject block occupied by residential use, as well as residential uses on Blocks 491 and 578, located to the north and west of the site; and

WHEREAS, in support of the above statements, the applicant submitted a land use map, showing the various uses in the immediate vicinity of the site; and

WHEREAS, as to the subject site, itself, the applicant states that two of the lots incorporated in the zoning lot were historically used primarily for residential use, with only ground floor commercial use; and

WHEREAS, the applicant asserts that many of the buildings on Varick Street and in the vicinity of the New Building are substantial in size, including 75 Varick Street,

southwest of the New Building, at 20 stories, to Trump Soho at the north end of the study area, with 42 stories; and

WHEREAS, the applicant asserts that the existing built fabric of the neighborhood is dense, consistent with its 10 FAR and printing house history; and

WHEREAS, the applicant asserts that on the subject block, there is an 18-story hotel, completed in 2008, and in the block immediately south of the site is a 23-story commercial building that was constructed between 1989 and 1992; and

WHEREAS, the applicant asserts that the mixed character and dense bulk of the surrounding area are recognized in the proposed Rezoning; and

WHEREAS, the applicant notes that the Rezoning proposes to permit residential use throughout the rezoning area, which will reach from Canal Street to West Houston Street, Avenue of the Americas to the east side of Greenwich Street, and that most of the Rezoning area will be zoned to permit an FAR of 10 for non-residential uses and 9 (bonusable to 12 for inclusionary housing) for residential use; and

WHEREAS, the applicant notes that, under the Rezoning, the anticipated maximum building height will be 320 feet with base heights of between 125 and 150 feet on wide streets and 60 and 125 feet on narrow streets more than 100 feet from a wide street; the required setback distance above the base height would be 10 feet on a wide street and 15 feet on a narrow street; and

WHEREAS, the applicant notes that a subdistrict has been proposed to maintain the smaller buildings in the area, but asserts that the purpose of the subdistrict is to address preserving the existing smaller scale buildings and not limiting the height for vacant sites, like the subject one; and

WHEREAS, the applicant states that it is expected that the Rezoning, which was certified into ULURP in August 2012, is expected to become final before the end of March 2013, and the revised form of the application, without the downzoning subdistrict component, which the Community Board rejected, will be approved; and

WHEREAS, the applicant asserts that the proposal is mostly consistent with the proposed Rezoning regulations, although it is of lesser bulk and does not maintain the street wall along Watts Street due to structural requirements; and

WHEREAS, the applicant asserts that the curb cut is necessary, even without parking at the site, in order to accommodate drop offs and loading and unloading to the site given the heavily-trafficked area, where such required vehicle access would otherwise be infeasible and onstreet drop off would hinder the flow of traffic; and

WHEREAS, the applicant asserts that its proposed construction plan reflects a sensitivity to the conditions on adjacent sites; and

WHEREAS, the Board agrees that the area is best characterized as mixed-use, and that the proposed residential use is compatible with the character of the community and the proposed Rezoning; and

WHEREAS, the Board finds that the proposal, with the

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noted setbacks, FAR reduction, and first floor commercial use are compatible with the neighborhood context and result in a use and building form that is consistent with the proposed rezoning; and

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

WHEREAS, as noted above, the applicant originally proposed a 14-story, 10 FAR building with 95,760 sq. ft. of floor area and parking on the first floor; and

WHEREAS, the Board expressed its dissatisfaction with this proposal at the first hearing, given that it reflected a degree of relief not consonant with the amount of hardship on the site; and

WHEREAS, as noted above, the Board recognized that the 8 FAR scheme was compatible with the context of the neighborhood; and

WHEREAS, the Board has reviewed the revised feasibility analysis and agrees that the 8.0 FAR scenario represents the degree of relief necessary to overcome the site's inherent hardship; and

WHEREAS, accordingly, the Board finds that this proposal is the minimum necessary to afford the owner relief; 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 conducted an environmental review of the proposed action and documented relevant information about the project in the Final Environmental Assessment Statement ("EAS") CEQR No. 12BSA068M, dated January 30, 2013; 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, the New York City Landmarks Preservation Commission ("LPC") reviewed the project for potential archaeological impacts and requested that an archaeological documentary study (Phase IA) be submitted for review and approval; and

WHEREAS, based on LPC's review and approval of the Phase IA Report, a Phase IB Archaeological Field Investigation Report was requested; and

WHEREAS, based on LPC's review of the Phase IB Archaeological Field Investigation Report, the proposed project is not anticipated to result in significant archaeological impacts; and

WHEREAS, the New York City Department of Environmental Protection's (DEP) Bureau of Environmental

Planning and Analysis reviewed the project for potential hazardous materials, air quality and noise impacts; and

WHEREAS, DEP reviewed and accepted the January 2013 Remedial Action Work Plan and site-specific Construction Health and Safety Plan; and

WHEREAS, DEP requested that a Remedial Closure Report be submitted to DEP for review and approval upon completion of the proposed project; and

WHEREAS, DEP reviewed the applicant's November 2012 stationary source air quality screening analysis and determined that the proposed project is not anticipated to result in significant stationary source air quality impacts; and

WHEREAS, DEP reviewed the results of noise monitoring and determined that a minimum of 35 dBA window-wall noise attenuation and an alternate means of ventilation should be provided in the proposed building's residential units in order to achieve an interior noise level of 45 dBA; and

WHEREAS, DEP determined that, with these noise measures, the proposed project is not anticipated to result in significant noise impacts; 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 M1-6 zoning district, a 13-story residential building, with 96 dwelling units, commercial use on the first floor, and a curb cut within 50 feet of the intersection, which is contrary to ZR § 42-10, 43-43, and 44-582, *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 January 10, 2013" – twelve (12) sheets; and *on further condition*:

THAT the bulk parameters of the proposed building shall be as follows: a total floor area of 76,608 sq. ft., a total FAR of 8 (residential FAR of 7.52 and commercial FAR of 0.48), 13 stories, 154'-0" building height, 96 residential units, and setbacks, all as illustrated on the BSA-approved plans;

THAT all residential units shall comply with all Multiple Dwelling Law requirements as to provision of light and air;

THAT DOB shall not issue a Certificate of Occupancy until the applicant has provided it with DEP's approval of the Remedial Closure Report;

THAT the sound attenuation measures in the proposed building will be maintained as reflected on the BSA-approved plans;

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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, February 5, 2013.

150-12-BZ

CEQR #12-BSA-133M

APPLICANT – Goldman Harris LLC, for Roseland/Stempel 21st Street, owner; TriCera Revolution, Inc., lessee.

SUBJECT – Application May 9, 2012 – Special Permit (§73-36) to permit a physical culture establishment (*Flywheel Sports*). C6-4A zoning district.

PREMISES AFFECTED – 39 West 21st Street, north side of West 21st Street, between 5th and 6th Avenues. Block 823, Lot 17. Borough of Manhattan.

COMMUNITY BOARD #5M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez4
Negative:.....0

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated May 8, 2012, acting on Department of Buildings Application No. 104339182, reads in pertinent part:

Proposed change of use to a physical culture establishment, as defined by ZR 12-10, is contrary to ZR 32-10 and must be referred to the Board of Standards and Appeals for approval pursuant to ZR 73-36; and

WHEREAS, this is an application under ZR §§ 73-36 and 73-03, to permit, on a site located in a C6-4A zoning district within the Ladies' Mile Historic District, the operation of a physical culture establishment (PCE) on a portion of the ground floor of a 15-story residential building, contrary to ZR § 32-10; and

WHEREAS, a public hearing was held on this application on October 23, 2012, after due notice by publication in *The City Record*, with a continued hearing on December 4, 2012, and then to decision on February 5, 2013; and

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

WHEREAS, Community Board 5, Manhattan, submitted a letter stating it has no objection to this application; and

WHEREAS, the subject site is located on the north side of West 21st Street between Fifth and Sixth Avenues, in a C6-4A zoning district within the Ladies' Mile Historic District; and

WHEREAS, the site has 99'-4" feet of frontage on West 21st Street, a depth of 197'-9", and a total lot area of 12,117 sq. ft.; and

WHEREAS, the site is occupied by a 15-story residential building; and

WHEREAS, the proposed PCE will occupy 5,820 sq. ft. of floor area on a portion of the ground floor; and

WHEREAS, the PCE will be operated as Flywheel Sports; and

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

WHEREAS, the hours of operation for the proposed PCE will be: Monday through Sunday, from 6:00 a.m. to 9:30 p.m.; and

WHEREAS, the applicant submitted a Certificate of No Effect from the Landmarks Preservation Commission (LPC), dated January 17, 2013, approving the proposed signage and other modifications under its jurisdiction; and

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

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

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

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

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

WHEREAS, the Board notes that the PCE has been in operation since February 2010, without a special permit; and

WHEREAS, accordingly, the Board has determined that the term of the grant will be reduced for the period of time equivalent to the period between February 2010 and the date of this grant; and

WHEREAS, the project is classified as a Type I action pursuant to 6 NYCRR Part 617.4; 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

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Assessment Statement, CEQR No.12BSA133M, dated May 9, 2012; and

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

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

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

Therefore it is Resolved that the Board of Standards and Appeals issues a Type I Negative Declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6NYCRR Part 617 and § 6-07(b) of the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR §§ 73-36 and 73-03 to permit, on a site located within a C6-4A zoning district and the Ladies' Mile Historic District, the operation of a physical culture establishment on a portion of the ground floor of a 15-story residential building, contrary to ZR § 32-10; *on condition* that all work shall substantially conform to drawings filed with this application marked "Received January 22, 2013"-Three (3) sheets and *on further condition*:

THAT the term of this grant will expire on February 1, 2020;

THAT there will 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 must be performed by New York State licensed massage therapists;

THAT the hours of operation will be limited to Monday through Sunday, from 6:00 a.m. to 9:30 p.m.;

THAT soundproofing will be installed and maintained as reflected on the BSA-approved plans;

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

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

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

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

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

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

and

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

Adopted by the Board of Standards and Appeals, February 5, 2013.

275-12-BZ

CEQR #13-BSA-030K

APPLICANT – Law Office of Fredrick A. Becker, for Faye Hirsch and Abraham Hirsch, owners.

SUBJECT – Application September 6, 2012 – Special Permit (§73-622) for the enlargement of an existing single family residence, contrary to floor area and open space (§23-141), and side yard (§23-461) regulations. R2 zoning district.

PREMISES AFFECTED – 2122 Avenue N, southwest corner of Avenue N and East 22nd Street, Block 7675, Lot 61, Borough of Brooklyn.

COMMUNITY BOARD #14BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated August 11, 2012, acting on Department of Buildings Application No. 320493131, reads in pertinent part:

1. Creates non-compliance with respect to floor area by exceeding the allowable floor area ratio and is contrary to Section 23-141 of the Zoning Resolution.
2. Creates non-compliance with respect to the open space ratio and is contrary to Section 23-141 of the Zoning Resolution.
3. Creates non-compliance with respect to the side yards by not meeting the minimum requirements of Section 23-461 of the Zoning Resolution; and

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

WHEREAS, a public hearing was held on this application on December 11, 2012, after due notice by publication in *The City Record*, with a continued hearing on January 15, 2013, and then to decision on February 5, 2013; and

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

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

WHEREAS, the subject site is located on the southwest corner of Avenue N and East 22nd Street, within an R2 zoning district; and

WHEREAS, the subject site has a total lot area of 6,000 sq. ft., and is occupied by a single-family home with a floor area of 3,106 sq. ft. (0.52 FAR); and

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

WHEREAS, the applicant seeks an increase in the floor area from 3,106 sq. ft. (0.52 FAR) to 5,129 sq. ft. (0.85 FAR); the maximum permitted floor area is 3,000 sq. ft. (0.50 FAR); and

WHEREAS, the applicant proposes to provide an open space ratio of 65 percent (150 percent is the minimum required); and

WHEREAS, the applicant proposes to provide a side yard with a width of 11'-0" along the southern lot line and a side yard with a width of 5'-0" along the western lot line (two side yards with widths of 20'-0" and 5'-0", respectively, are required); and

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

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

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

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

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

Therefore it is resolved, that the Board of Standards and Appeals issues a Type II determination under 6 N.Y.C.R.R. Part 617.5 and 617.3 and §§ 5-02(a), 5-02(b)(2) and 6-15 of the Rules of Procedure for City Environmental Quality Review and makes the required findings under ZR §§ 73-622 and 73-03, to permit, in an R2 zoning district, the proposed enlargement of a single-family home, which does not comply with the zoning requirements for FAR, open space ratio, and side yards, contrary to ZR §§ 23-141 and 23-461; *on condition* that all work shall substantially

conform to drawings as they apply to the objections above-noted, filed with this application and marked "Received January 22, 2012"-(11) sheets; and *on further condition*:

THAT the following will be the bulk parameters of the building: a maximum floor area of 5,129 sq. ft. (0.85 FAR); a minimum open space ratio of 65 percent; a side yard along the southern lot line with a minimum width of 11'-0" and a side yard along the western lot line with a minimum width of 5'-0", as illustrated on the BSA-approved plans;

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

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

Adopted by the Board of Standards and Appeals, February 5, 2013.

43-12-BZ

APPLICANT – Raymond H. Levin, Wachtel & Masyr, LLP, for SDS Great Jones, LLC, owner.

SUBJECT – Application February 17, 2012 – Variance (§72-21) to permit a residential building, contrary to use regulations (§42-00). M1-5B zoning district.

PREMISES AFFECTED – 25 Great Jones Street, lot fronting on both Great Jones and Bond Street, between Lafayette and Bowery Streets, Block 530, Lot 19, Borough of Manhattan.

COMMUNITY BOARD #2M

THE VOTE TO REOPEN HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4
Negative:.....0

Absent: Commissioner Ottley-Brown.....1

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4
Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to April 9, 2013, at 1:30 P.M., for decision, hearing closed.

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241-12-BZ

APPLICANT – Greenberg Traurig, LLP by Deidre A. Carson, Esq., for 8-12 Development Partners, owners; 10-12 Bond Street, lessee.

SUBJECT – Application August 2, 2012 – Variance (§72-21) to permit the construction of a new mixed residential and retail building, contrary to use regulations (§42-10 and 42-14D(2)(b)). M1-5B zoning district.

PREMISES AFFECTED – 8-12 Bond Street aka 358-364 Lafayette Street, northwest corner of the intersection of Bond and Lafayette Streets, Block 530, Lot 62, Borough of Manhattan.

COMMUNITY BOARD #2M

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for deferred decision.

50-12-BZ

APPLICANT – Gerald J. Caliendo, R.A., AIA, for 177-90 Holding LLC/Donald McLoughlin, owner.

SUBJECT – Application March 5, 2012 – Variance (§72-21) to allow for the construction of a commercial building contrary to use regulations, ZR 22-00. R3-2 zoning district.

PREMISES AFFECTED – 177-60 South Conduit Avenue, south side of South Conduit Avenue, 229/83' west of corner of South Conduit Avenue and Farmers Boulevard, Block 13312, Lot 146, Borough of Queens.

COMMUNITY BOARD #12Q

ACTION OF THE BOARD – Laid over to April 9, 2013, at 1:30 P.M., for continued hearing.

57-12-BZ

APPLICANT – Eric Palatnik, P.C., for Mykola Volynsky, owner.

SUBJECT – Application March 13, 2012 – Special Permit (§73-622) for the enlargement of an existing single family home, contrary to floor area, open space and lot coverage (§23-141); side yards (§23-461); less than the required rear yard (§23-37). R4 zoning district.

PREMISES AFFECTED – 2670 East 12th Street, between Shore Parkway and Gilmore Court, Block 7455, Lot 85, Borough of Brooklyn.

COMMUNITY BOARD #15BK

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for continued hearing.

161-12-BZ

APPLICANT – Francis R. Angelino, Esq., for Soly D. Bawabeh, for Global Health Clubs, LLC, owner.

SUBJECT – Application May 31, 2012 – Special Permit (§73-36) to permit a physical culture establishment (*Retro Fitness*) on the ground and second floor of an existing building. C8-2 zoning district.

PREMISES AFFECTED – 81 East 98th Street, corner of East 98th Street and Ralph Avenue, Block 3530, Lot 1,

Borough of Brooklyn.

COMMUNITY BOARD #16BK

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for decision, hearing closed.

195-12-BZ

APPLICANT – The Law Offices of Eduardo J. Diaz, for Garmac Properties LLC, owner.

SUBJECT – Application June 15, 2012 – Re-instatement (§11-411) of a previously approved variance which allowed a two-story office building (UG6) and four parking spaces, which expired on May 13, 2000. Waiver of the Rules. R4 zoning district.

PREMISES AFFECTED – 108-15 Crossbay Boulevard, between 108th and 109th Avenues. Block 9165, Lot 291. Borough of Queens.

COMMUNITY BOARD #10Q

ACTION OF THE BOARD – Laid over to March 12, 2013, at 1:30 P.M., for adjourned hearing.

235-12-BZ

APPLICANT – Slater & Beckerman, LLP, for NBR LLC, owner.

SUBJECT – Application July 30, 2012 – Special Permit (§73-242) to allow a one-story building to be used as four eating and drinking establishments (Use Group 6), contrary to use regulations (§32-00). C3 zoning district.

PREMISES AFFECTED – 2771 Knapp Street, East side of Knapp Street, between Harkness Avenue to the south and Plumb Beach Channel to the north. Block 8839, Lots 33, 38, Borough of Brooklyn.

COMMUNITY BOARD #15BK

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for decision, hearing closed.

238-12-BZ

APPLICANT – Harold Weinberg, for Stuart Ditchek, owner.

SUBJECT – Application August 1, 2012 – Special Permit (§73-622) for the enlargements of single family home contrary floor area and lot coverage (ZR §23-141); side yards (ZR 23-461) and less than the required rear yard (ZR §23-47). R 3-2 zoning district.

PREMISES AFFECTED – 1713 East 23rd Street, between

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Quentin Road and Avenue R, Block 6806, Lot 86, Borough of Brooklyn.

COMMUNITY BOARD #15BK

ACTION OF THE BOARD – Laid over to March 12, 2013, at 1:30 P.M., for continued hearing.

257-12-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Birta Hanono and Elie Hanono, owners.

SUBJECT – Application August 29, 2012 – Special Permit (§73-622) for the enlargement of an existing single family home, contrary to floor area, open space and lot coverage (§23-141); side yard (§23-461) and less than the required rear yard (§23-47). R4 (OP) zoning district.

PREMISES AFFECTED – 2359 East 5th Street, east side of East 5th Street between Avenue W and Angela Drive, Block 7181, Lot 44, Borough of Brooklyn.

COMMUNITY BOARD #15BK

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for decision, hearing closed.

280-12-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Sheila Weiss and Jacob Weiss, owners.

SUBJECT – Application September 21, 2012 – Special Permit (§73-622) for the enlargement of an existing single family home, contrary to floor area, open space (§23-141); side yards (§23-461) and less than the required rear yard (§23-47). R2 zoning district.

PREMISES AFFECTED – 1249 East 28th Street, east side of 28th Street, Block 7646, Lot 26, Borough of Brooklyn.

COMMUNITY BOARD #14BK

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for decision, hearing closed.

296-12-BZ

APPLICANT – Rothkrug Rothkrug & Spector, LLP, for 2374 Concourse Associates LLC, owner; Blink 2374 Grand Concourse Inc., lessee.

SUBJECT – Application October 16, 2012 – Special Permit (§73-36) to permit a physical culture establishment (*Blink Fitness*) within existing building. C4-4 zoning district.

PREMISES AFFECTED – 2374 Grand Concourse, northeast corner of intersection of Grand Concourse and

East 184th Street, Block 3152, Lot 36, Borough of Bronx.

COMMUNITY BOARD #5BX

THE VOTE TO CLOSE HEARING –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Commissioner Ottley-Brown.....1

ACTION OF THE BOARD – Laid over to March 5, 2013, at 1:30 P.M., for decision, hearing closed.

Jeff Mulligan, Executive Director

Adjourned: P.M.

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*CORRECTION

This resolution adopted on January 8, 2013, under Calendar No. 156-12-BZ and printed in Volume 98, Bulletin Nos. 1-2, is hereby corrected to read as follows:

156-12-BZ

CEQR #12-BSA-137K

APPLICANT – Sheldon Lobel, for Prospect Equities Operating, LLC, owner.

SUBJECT – Application May 17, 2012 – Variance (§72-21) to permit construction of a mixed-use residential building with ground floor commercial use, contrary to minimum inner court dimensions (§23-851). C1-4/R7A zoning district.

PREMISES AFFECTED – 816 Washington Avenue, southwest corner of Washington Avenue and St. John’s Place, Block 1176, Lot 90, Borough of Brooklyn.

COMMUNITY BOARD #8BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated April 17, 2012, acting on Department of Buildings Application No. 320373742, reads in pertinent part:

Proposed inner court for the residential portion of proposed ‘mixed building’ does not comply with minimum required dimensions; contrary to ZR 23-851; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site within an C1-4 (R7A) zoning district, a five-story mixed-use commercial/residential building with UG 6 on the ground floor and eight affordable housing units, which does not comply with the requirements for inner courts, contrary to ZR § 23-851; and

WHEREAS, a public hearing was held on this application on November 27, 2012, after due notice by publication in the *City Record*, and then to decision on January 8, 2013; and

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

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

WHEREAS, Councilmember Letitia James submitted a letter in support of the application; and

WHEREAS, the subject premises is a corner lot bounded by Washington Avenue to the east and St. John’s Place to the north, within an C1-4 (R7A) zoning district; and

WHEREAS, the site is irregular in shape with approximately 22’-6” of frontage on Washington Avenue and 87’-10” of frontage on St. John’s Place, with a total lot area of

3,972 sq. ft.; and

WHEREAS, the site is currently vacant, as a fire in June 2011 destroyed the mixed-use four-story building previously on the site; and

WHEREAS, the applicant proposes to construct a five-story and cellar mixed-use building, with Use Group 6 commercial use on the first floor and Use Group 2 affordable housing units on the second through fifth floors; and

WHEREAS, the proposed building will measure approximately 15,700 sq. ft. in floor area, with an FAR of 3.95 (the zoning district permits 15,888 sq. ft. and a maximum allowable FAR of 4.0), and will contain a total of eight residential units; and

WHEREAS, however, ZR § 23-851 requires a minimum inner court dimension of 30 feet and a minimum area of 1,200 sq. ft.; and

WHEREAS, the applicant proposes an inner court with dimensions of 23’-10” by 19’-5½” and 730 sq. ft. of area, a reduction of 7’-0” and approximately 10’-0” in dimensions, and 472 sq. ft. of area; and

WHEREAS, the applicant asserts that the irregular shape of the lot and the history of the site contribute to the unique physical condition, which creates an unnecessary hardship in developing the site in compliance with applicable regulations; and

WHEREAS, the applicant states that the site has an irregular trapezoid shape, with a depth ranging from 22’-6” along Washington Avenue to 63’-3” at the rear of the site; and

WHEREAS, the applicant’s land use map reflects that due to the angle at which Washington Avenue intersects St. John’s Place and other parallel streets within the 400-ft. radius, there are approximately seven sites within the area that are of similar shape and size, but only the subject site is vacant; and

WHEREAS, as to the history of the site, in June 2008, the applicant purchased the mixed-use four-story building on the site in foreclosure as part of the Department of Housing Preservation and Development’s (HPD) Third Party Transfer Program; and

WHEREAS, the applicant states that the program requires developers to temporarily relocate existing tenants while the building is being rehabilitated and reinstall the tenants in units of the same size once the restoration of the building is complete; and

WHEREAS, further, the applicant states that the owner entered into a regulatory agreement with the City of New York which requires compliance with certain restrictions for a 30-year period, including mandated residential rent levels and minimum household sizes; and

WHEREAS, the applicant submitted a letter from HPD reflecting that it supports the proposal and has given the applicant a low-interest rate loan through the Third Party Transfer Program, which dictates unit sizes and number of dwelling units for each proposed project; and

WHEREAS, the applicant states that the former building was occupied by three four-bedroom units with floor areas of 1,223 sq. ft. each and three three-bedroom units with floor

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area of 1,007 sq. ft. each; and

WHEREAS, the proposed building will have four four-bedroom units with floor area of 1,286 sq. ft. each and four three-bedroom units with floor area of 1,040 sq. ft. each; and

WHEREAS, the applicant's analysis reflects that the complying building can accommodate units with 998 sq. ft. and 1,185 sq. ft., which can accommodate two and three bedrooms, respectively, rather than three and four bedrooms in the former building; and

WHEREAS, accordingly, the applicant states that a fully complying building would only accommodate smaller units with fewer bedrooms or fewer units and would not satisfy the requirement to replace the former units; and

WHEREAS, the applicant notes that a complying building may be able to accommodate more units, but they would not be able to replace the existing ones without creating duplexes which are impractical and inefficient for such a small building due to the introduction of individual circulation space; and

WHEREAS, the applicant states that to reflect the conditions of the prior building on the site, to be re-occupied by former tenants, the proposal includes four three-bedroom units and four four-bedroom units, similar in size to the prior units; and

WHEREAS, the applicant represents that due to the irregular shape of the lot and the court requirements, no complying building can be accommodated that would meet both inner court and HPD requirements regarding restoration of former tenants to dwelling units with identical room counts; and

WHEREAS, further, the applicant provided an analysis of a similar sized lot that is regular and rectangular in shape that showed that a conforming building accommodates and satisfies all HPD requirements regarding restoration of former tenants to dwelling units with former sizes and room counts; and

WHEREAS, the applicant states that the analysis confirms that the irregular shape of the site, which is a unique condition, creates a hardship for a conforming proposal to comply with zoning regulations and meet the programmatic needs established by HPD; and

WHEREAS, the applicant represents that the proposed inner court dimensions are the minimum needed to create units that meet HPD requirements; and

WHEREAS, the Board notes that the floor plate is dictated by the prior conditions and irregular lot and, thus there is little flexibility in satisfying the required quantity and size of units, but that because additional floor area was available, it allowed for another floor in the same footprint as the required floors; and

WHEREAS, further, the Board notes that it is not feasible to create duplex units to replace existing single floor units in such a small building; and

WHEREAS, the Board agrees that the unique shape, and history of the building on the site, with related HPD requirements, creates practical difficulties and unnecessary hardship in developing the site in compliance with the

applicable zoning regulations; and

WHEREAS, the applicant submitted a feasibility study analyzing (1) an as-of-right scenario with mixed-use and a complying inner court; (2) an as-of-right scenario with mixed-use and a side yard with a width of eight feet; (3) an as-of-right scenario with an outer court; and (4) the proposed scenario; and

WHEREAS, the study concluded that the only scenario which would result in a reasonable return is the proposed; and

WHEREAS, based upon its review of the applicant's submissions, the Board has determined that because of the subject lot's unique physical conditions and history, there is no reasonable possibility that development in strict compliance with applicable zoning requirements will provide a reasonable return; and

WHEREAS, the applicant represents that the proposed variance will not negatively affect the character of the neighborhood, nor impact adjacent uses; and

WHEREAS, the applicant states that the court is not required on the ground floor, which will be occupied by commercial use, thus, the waiver only applies to floors two through five; and

WHEREAS, the applicant states that on both the Washington Avenue and St. John's Place sides of the building, a fully complying court would result in the building abutting the adjacent buildings for a greater depth than they do in the proposed scenario; and

WHEREAS, the applicant notes that the new building will replace the former building, which was constructed in approximately 1920 and did not provide a complying inner court, or required egress or fire safety measures; and

WHEREAS, accordingly, the applicant asserts that the proposed building will comply with all egress and fire safety requirements and will therefore provide increased safety to residents of the building as well as adjacent buildings; and

WHEREAS, the applicant represents that the impacts of the proposed waiver of inner court regulations on adjacent properties will be negligible when compared to available as-of-right scenarios; and

WHEREAS, based upon the above, the Board finds that this action will not alter the essential character of the surrounding neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

WHEREAS, the applicant represents that the hardship was not created by the owner or a predecessor in title, but that the irregular shape of the lot is a historic condition; and

WHEREAS, based on the above, the Board agrees that the hardship herein was not created by the owner or a predecessor in title; and

WHEREAS, the applicant states that the proposal complies with all bulk regulations except inner court dimensions and that it is the minimum variance needed to allow for a reasonable and productive use of the site; and

WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 72-21; and

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WHEREAS, the project is classified as an Unlisted action pursuant to Section 617 of 6NYCRR; 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. 12BSA137K, dated May 17, 2012; 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, to permit, on a site within an C1-4 (R7A) zoning district, a five-story mixed-use commercial/residential building with UG 6 on the ground floor and eight affordable housing units, which does not comply with the requirements for inner courts, contrary to ZR § 23-851; *on condition* that any and all work will substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received January 3, 2013"— eleven (11) sheets; and *on further condition*:

THAT the parameters of the building will be: five stories, a total height of 52'-1/2" without bulkhead, a total floor area of 15,700 sq. ft. (3.95 FAR), an inner court with the minimum dimensions of 23'-10" by 19'-5½", and a lot coverage of 79 percent, as illustrated on the Board-approved plans;

THAT the internal floor layouts on each floor of the proposed building will be as reviewed and approved by DOB;

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;

THAT substantial construction will 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, January 8, 2013.

***The resolution has been amended. Corrected in Bulletin No. 6, Vol. 98, dated February 13, 2013.**