

**171-08-BZ**

APPLICANT – Law Offices of Howard Goldman, LLC, for York Prep Realty, LLC., owner.

SUBJECT – Application June 26, 2008 – Variance (§72-21) to allow the enlargement of an existing school (*York Prep*) contrary to ZR §74-95 (City Planning Commission Housing Quality Special Permit). R8 zoning district.

PREMISES AFFECTED – 40 West 68<sup>th</sup> Street, between Central Park West and Columbus Avenue, Block 1120, Lot 48, Borough of Manhattan.

**COMMUNITY BOARD #7M**

APPEARANCES –

For Applicant: Howard Goldman.

**ACTION OF THE BOARD** – Application granted on condition.

**THE VOTE TO GRANT** –

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

Negative:.....0

**THE RESOLUTION** –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated June 8, 2009, acting on Department of Buildings Application No. 103217573, reads, in pertinent part:

“Property is subject to City Planning Commission Housing Quality Special Permit (C840206ZSM, approved 2/1/84). Proposed plans are not permitted pursuant to ZR 74-95 and require a variance from the Board of Standards and Appeals”; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site in an R8 zoning district within the Upper West Side-Central Park West Historic District, the enlargement of a five-story and cellar educational facility (Use Group 3), which is contrary to ZR § 74-95; and

WHEREAS, a public hearing was held on this application on October 6, 2009, after due notice by publication in the *City Record*, with a continued hearing on November 10, 2009, and then to decision on December 8, 2009; and

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

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

WHEREAS, residents of the adjacent building to the rear of the site, represented by counsel, provided written testimony in opposition to the original proposal (the “Opposition”), citing concerns with the effect of the original proposal on the light and air of the adjacent building to the rear; and

WHEREAS, the applicant revised its plans to reduce the bulk of the enlargement, in response to the Opposition’s concerns; and

WHEREAS, this application is brought on behalf of the York Preparatory School (the “School”); and

WHEREAS, the site is located on the south side of West 68<sup>th</sup> Street between Columbus Avenue and Central Park West; and

WHEREAS, the applicant notes that the site is a single zoning lot consisting of two separate tax lots: (1) Tax Lot 48 is situated on the eastern portion of the site, where the subject five-story and cellar school building is located; and (2) Tax Lot 51 is situated on the western portion of the site, where an 11-story residential building (the “Residential Building”) is located; and

WHEREAS, the zoning lot has a rectangular shape with approximately 154 feet of frontage on West 68<sup>th</sup> Street, a depth of 100 feet, and a total lot area of 15,464 sq. ft.; Tax Lot 48, the subject tax lot, has approximately 77’-3” of frontage on West 68<sup>th</sup> Street, a depth of 100 feet, and a total lot area of 7,757 sq. ft.; and

WHEREAS, the applicant states that in 1984, the City Planning Commission (“CPC”) approved a special permit pursuant to ZR § 74-95 (“Housing Quality Developments”) to modify the requirements for building height and setback, open space, and distance between buildings in connection with the development of the Residential Building on the subject zoning lot (the “Special Permit”); and

WHEREAS, the applicant further states that the Special Permit limited development of both Lot 48 and Lot 51 to the approved plans and required that any alteration to the plans be approved by the CPC; and

WHEREAS, however, Housing Quality was eliminated from the Zoning Resolution and replaced by Quality Housing in 1987, and ZR § 74-95 was amended to permit modification of Housing Quality special permits granted before August 14, 1987, but excludes certain kinds of modifications, including: an increase in floor area, the extension of the location of exterior walls, or an increase in the portion of the zoning lot covered by the building; and

WHEREAS, the applicant notes that, although the proposed enlargement creates an additional 855 sq. ft. of floor area, a waiver of the Special Permit’s prohibition on increasing floor area is not required due to the reduction in floor area that resulted from the removal of the first floor auditorium for the creation of a two-story cellar gymnasium pursuant to a 1997 alteration to the School; thus, the proposed floor area is actually less than what was approved pursuant to the Special Permit; and

WHEREAS, however, the applicant proposes to extend the location of the exterior walls and increase the portion of the zoning lot covered by the building; and

WHEREAS, the applicant initially sought relief from the Department of City Planning (“DCP”); and

WHEREAS, by letter to the applicant dated July 23, 2007, DCP states that the findings of ZR § 74-95 would not be met by the proposed enlargement, and therefore a variance would be required in order to

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develop the proposed enlargement; and

WHEREAS, by letter to the Opposition dated December 23, 2008, DCP added that its determination that a variance is the appropriate means of modifying the Special Permit does not set improper precedent because the provision allowing modification of the Special Permit specifically prohibits the CPC from permitting the proposed modifications; and

WHEREAS, further, DCP states that since no relief is available from CPC, the applicant should not be precluded from seeking relief elsewhere; and

WHEREAS, DCP distinguishes the subject application from those where the CPC may modify a special permit condition as proposed and thus relief from the Board is not necessary or appropriate; and

WHEREAS, the Board agrees with DCP that this case, involving a discontinued program and an amended special permit is a rare example of when a variance is an appropriate means of modifying a special permit under CPC's jurisdiction and there is limited applicability of such practice; and

WHEREAS, further, the Board notes that the proposed enlargement, which does not create any new non-compliance, is within the spirit of the Special Permit; and

WHEREAS, because the site is also located within the Upper West Side-Central Park West Historic District, the applicant has obtained a Certificate of Appropriateness from the Landmarks Preservation Commission ("LPC") for the proposed development, dated October 5, 2009; and

WHEREAS, the School proposes to construct a side and rear enlargement to the cellar and first floor; and

WHEREAS, the School currently occupies 25,799 sq. ft. of floor area; the proposed enlargement will add 855 sq. ft. of floor area at the first floor and an additional 1,510 sq. ft. of floor space at the cellar, for a total floor area of 26,654 sq. ft.; and

WHEREAS, the applicant initially proposed to construct an enlargement with a floor area of 2,424 sq. ft., for a total floor area of 28,226 sq. ft.; and

WHEREAS, in response to concerns raised by the Opposition, the applicant revised its plans to eliminate the second floor of the enlargement on the west side of the building and set back the first floor of the enlargement on both sides of the building a distance of ten feet from the rear lot line, thereby reducing the floor area of the enlargement to 855 sq. ft.; and

WHEREAS, the enlargement will be occupied by (1) a classroom, office, health care office, seating area, and circulation space at the cellar; and (2) a classroom and circulation space on the first floor; and

WHEREAS, the applicant states that the following are the programmatic needs of the School: (1) additional classroom space for Jump Start, the School's special education program; (2) a health care office to support health care services for the faculty, students and parents;

and (3) additional seating within the gymnasium; and

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

WHEREAS, the applicant states that the School is a member of the Middle States Association of Colleges and Schools ("Middle States"), a non-governmental, voluntary organization of educational institutions that establishes criteria, evaluates, and accredits member institutions; and

WHEREAS, the applicant further states that in 2003, Middle States evaluated the School's program and reviewed every component of the School to be utilized in the accreditation process; and

WHEREAS, the Middle States report identified a lack of classroom space for the School's special education program, the need for a health office, and insufficient seating in the gymnasium; and

WHEREAS, as to the need for classroom space, the applicant states that approximately 25 percent of students receive special education through the School's Jump Start program, which assists students with specific learning disabilities in language processing, reading, writing, math, time management skills and organizational skills; and

WHEREAS, the applicant further states that 11 faculty members provide assistance to approximately 100 students in the Jump Start program, and that due to a lack of classrooms the services are provided in small shared settings; and

WHEREAS, the applicant represents that there is a programmatic need for additional classroom space so that teachers do not have to share a room with other teachers while working with students in the Jump Start program; and

WHEREAS, as to the need for a health care office, the applicant states that the School does not have a dedicated health care office, and health care services are currently provided in a portion of the gym; and

WHEREAS, the applicant further states that the current design does not afford an appropriate degree of privacy for students; and

WHEREAS, the applicant represents that the proposed enlargement would satisfy the programmatic need for a health office with the materials and resources needed to support health care services for the faculty, students, and parents; and

WHEREAS, as to the need for additional seating in the gymnasium, the applicant represents that the current number of seats within the gymnasium is inadequate, and the Middle States evaluation identified a need for additional seating; and

WHEREAS, the Board acknowledges that the School, as an educational institution, is entitled to significant deference under the law of the State of New York as to zoning and as to its ability to rely upon

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programmatic needs in support of the subject variance application; and

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

WHEREAS, however, the applicant represents that the unique configuration of the existing building and the existence of a special permit under a discontinued program that cannot be modified create an unnecessary hardship in developing the site in compliance with applicable regulations; and

WHEREAS, as to the configuration of the existing building, the applicant states that the unique shape of the building results in two trapezoidal open areas beginning approximately one-third of the distance from the street on each side lot line and wrapping around the corners of the rear yard, resulting in a combination of triangle and L-shaped open space; and

WHEREAS, the applicant represents that an architectural analysis identified these side and rear open areas as the only feasible expansion option; and

WHEREAS, the applicant further represents that filling in this irregularly shaped area with viable education space presents a significant architectural challenge, and that the building's location within the historic district further constrains the ability to enlarge the building; and

WHEREAS, the applicant states that there is no as-of-right alternative to enlarge this building because ZR § 74-95 does not permit any modification of the Special Permit that would increase floor area, expand the exterior walls or increase the portion of the zoning lot covered by a building; and

WHEREAS, the applicant represents that an as-of-right enlargement is not possible under these limitations; and

WHEREAS, the applicant states that, but for the existence of the Special Permit, the proposed enlargement would be as-of-right; and

WHEREAS, the applicant represents that the requested waivers of the Special Permit's lot coverage and open space restrictions are necessary in order to satisfy the programmatic needs of the School; and

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

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

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

WHEREAS, the applicant represents that the subject variance is necessary to ensure the continuation and future academic success of the School and to remain competitive with similar institutions; and

WHEREAS, specifically, the applicant states the requested variance is needed to provide additional classroom space to the Jump Start program, which accounts for \$2.8 million, or approximately 30 percent, of the School's annual revenue; and

WHEREAS, the applicant represents that the inability to meet the Jump Start program's programmatic need for additional classroom space would threaten the long-term viability of the Jump Start program and the revenues it generates; and

WHEREAS, the applicant further represents that the School's annual income is approximately \$8.4 million and its operating expenses, including salaries and scholarships, are more than \$7.5 million per year; and

WHEREAS, the applicant notes that without the Jump Start program, the School's annual income would be reduced to approximately \$5.6 million; thus, any significant loss of tuition revenues associated with Jump Start would threaten the School's financial viability; and

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

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

WHEREAS, the applicant represents that the land uses surrounding the site are characterized by a mix of residential, commercial, and community facility uses; and

WHEREAS, the applicant states that the proposed enlargement consists of a small expansion of an existing school, with no increase in height, which will be located behind the street wall and therefore not visible from the street; and

WHEREAS, the applicant further states that the Residential Building does not have any windows on its western wall facing the portion of the subject site where the proposed enlargement will be located, and the height of the enlargement was reduced to one-story adjacent to the Residential Building; and

WHEREAS, the applicant also reduced the enlargement from two stories to one-story adjacent to the synagogue to the east so as not to obstruct a stained glass window; and

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WHEREAS, additionally, the applicant has agreed to backlight the synagogue's affected lower level window; and

WHEREAS, as discussed above, the applicant notes that the proposed enlargement would be permitted as-of-right if not for the Special Permit which prohibits the expansion of exterior walls and increase in the portion of the zoning lot covered by the building; and

WHEREAS, accordingly, the Board finds that this action will not alter the essential character of the surrounding neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

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

WHEREAS, accordingly, the Board finds that the hardship herein was not created by the owner; and

WHEREAS, as to the minimum variance, as noted above, the applicant revised the proposal to eliminate the second floor of the enlargement on the west side of the building and set back the first floor of the enlargement on both sides of the building a distance of 10'-0", thereby reducing the floor area of the proposed enlargement from 2,424 sq. ft. to 855 sq. ft.; and

WHEREAS, the applicant represents that the requested waivers of the Special Permit, which do not otherwise trigger zoning non-compliances, are the minimum necessary to accommodate the School's current and projected programmatic needs; and

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

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

WHEREAS, the project is classified as Type II action pursuant to Sections 617.12 (aj) and 617.5 of 6 NYCRR; and

*Therefore it is Resolved* that the Board of Standards and Appeals issues a Type II determination, 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 in an R8 zoning district within the Upper West Side-Central Park West Historic District, the enlargement of a five-story and

**A true copy of resolution adopted by the Board of Standards and Appeals, December 8, 2009.**

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**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

cellar educational facility (Use Group 3), which is contrary to ZR § 74-95, *on condition* that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received September 29, 2009" – two (2) sheets and "Received June 25, 2009" – eight (6) sheets; and *on further condition*:

THAT the parameters of the zoning lot shall be as follows: a total zoning lot floor area of 82,369 sq. ft. (5.32 FAR); and a community facility floor area of 26,654 sq. ft. (1.72 FAR), as reflected 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 objection(s);

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

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

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

Adopted by the Board of Standards and Appeals, December 8, 2009.