78-11-BZ
CEQR #11-BSA-104Q
APPLICANT – Sheldon Lobel, P.C., for Indian Cultural and Community Center, Incorporated, owner.
SUBJECT – Application May 27, 2011 – Variance (§72-21) to allow for the construction of two assisted living residential buildings, contrary to use regulations (§32-10).
PREMISES AFFECTED – 78-70 Winchester Boulevard, Premises is a landlocked parcel located just south of Union Turnpike and west of 242nd Street, Block 7880, Lots 550, 500 Borough of Queens.
COMMUNITY BOARD #13Q
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Perlmutter; Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez.....4
Negative:.....0
THE RESOLUTION –

WHEREAS, the decision of the Department of Buildings ("DOB"), dated April 27, 2011, acting on DOB Application No. 420340349, reads, in pertinent part:

Proposed residential use is contrary to ZR § 32-11; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site within a C8-1 zoning district, the construction of a four-story mixed residential (Use Group 2) and community facility (Use Group 4) building with 57 dwelling units for persons 55 years of age or older, contrary to ZR § 32-11; and

WHEREAS, the applicant filed companion cases under BSA Calendar Nos. 33-12-A, 34-12-A, 35-12-A, 36-12-A, and 37-12-A, pursuant to General City Law § 36, to allow the proposed construction not fronting on a mapped street; those applications were granted on March 10, 2015; and

WHEREAS, a public hearing was held on this application on September 10, 2013, after due notice by publication in the *City Record*, with continued hearings on February 25, 2014, September 23, 2014 and November 25, 2014, and then to decision on March 10, 2015; and

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

WHEREAS, this application is brought on behalf of the Indian Cultural and Community Center, Inc. ("ICCC"), a secular, non-profit corporation; the applicant represents that ICCC was formed in 2002 to enable the creation of a common facility in which to (1) conduct the community's social and cultural activities and (2) provide services, including housing, for seniors; and

WHEREAS, the applicant notes that ICCC acquired the site from the Dormitory Authority of the State of New York ("DASNY") in July 2008; the deed from DASNY to ICCC states that the site "shall only be used for community activities and social gatherings" and that "so long as the property is owned by [ICCC] the property may be used by [ICCC] to provide a residential facility for the aged at which a spouse and dependent children may reside and at which assistive services may be provided"; and

WHEREAS, the Board notes that the application has been significantly altered through the hearing process; originally, the applicant sought approval for two, nine-story buildings (the "Original Application"); one building was proposed to have both residential and community facility uses, a maximum building height of nearly 98 feet, 89,946 sq. ft. of floor area (1.08 FAR) and 72 dwelling units; the other building would be entirely residential, have a building height of 97 feet, 87,964 sq. ft. of floor area (1.06 FAR) and 71 dwelling units; in total, the original proposal reflected the construction of 143 dwelling units and 177,910 sq. ft. of floor area (2.14 FAR) at the site; and

WHEREAS, through the hearing process, the application was amended to reflect one four-story building, with a maximum building height of 43'-6" (excluding bulkheads), 66,563 sq. ft. of floor area (0.80 FAR) (10,380 sq. ft. of community facility floor area and 56,183 sq. ft. of residential floor area), and 57 dwelling units (the "Amended Application" or the "proposal"); and

WHEREAS, Community Board 13, Queens, recommended disapproval of the Original Application and recommends disapproval of the Amended Application; the community board's primary concern is that the proposed use and bulk are inconsistent with the character of the surrounding neighborhood; and

WHEREAS, State Senator Tony Avella testified in opposition to both the Original Application and the Amended Application, citing the following primary concerns: (1) ICCC's alleged improprieties in obtaining the site from the State of New York; (2) the proposed use, which he considers inconsistent with the deed restrictions; (3) the bulk of the proposed building, which he considers incompatible with the surrounding neighborhood; and (4) concerns about the traffic and parking impacts of the community center; and

WHEREAS, Assemblyperson Barbara Clark submitted testimony in opposition to the Original Application, citing concerns regarding neighborhood character; and

WHEREAS, Councilmember Mark Weprin submitted testimony in opposition to both the Original Application and the Amended Application, expressing concerns regarding ICCC's request to provide a residential facility, which he characterizes as inconsistent with the state legislation that authorized DASNY to sell the site to ICCC; and

WHEREAS, certain members of the surrounding

community, including members of the Bellerose Hillside Civic Association, the Rocky Hill Civic Association, the Creedmoor Civic Association, the Bellerose Commonwealth Civic Association, the North Bellerose Civic Association, the Queens Colony Civic Association, the Glen Oaks Village Owners Association, Eastern Queens United, and the Queens Civic Congress, and some members represented by counsel, submitted testimony in opposition to the Original Application and the Amended Application (the "Opposition"); and

WHEREAS, the Opposition identified the following reasons for its objection to the Original Application: (1) ICCC's alleged improprieties in obtaining the site from the State of New York; (2) the bulk and density of the proposed building, which the Opposition asserts is incompatible with the surrounding neighborhood; (3) concerns about the traffic and parking impacts of the community center; (4) the loss of trees and open space; and (5) ICCC's financial and technical ability to construct and manage the proposed facility; and

WHEREAS, certain members of the surrounding community submitted testimony in support of both Original and Amended Applications; and

WHEREAS, the subject site is an irregularly-shaped lot located south of Union Turnpike and west of 242nd Street, within a C8-1 zoning district; and

WHEREAS, the site, which does not front on a mapped street, is located within the boundaries of the Creedmoor Psychiatric Center Campus ("Creedmoor"), an approximately 300-acre parcel bounded by Union Turnpike, Winchester Boulevard, Hillside Avenue, and the Cross-Island Parkway; and

WHEREAS, the site has approximately 83,252 sq. ft. of lot area and has been used for vehicle storage and other industrial uses; and

WHEREAS, as noted above, the applicant seeks to construct a four-story building with a maximum building height of 43'-6" (excluding bulkheads), 66,563 sq. ft. of floor area (0.80 FAR) (10,380 sq. ft. of community facility floor area and 56,183 sq. ft. of residential floor area), 57 dwelling units, and 75 parking spaces; and

WHEREAS, pursuant to ZR § 32-11, Use Group 2 is not permitted within the subject C8-1 zoning district; and

WHEREAS, accordingly, the proposed residential use requires a variance; and

WHEREAS, the applicant asserts that the site qualifies for the requested variance under ZR § 72-21; and

WHEREAS, the applicant states that, per ZR § 72-21(a), the following are unique physical conditions that create practical difficulties and unnecessary hardship in developing the site in conformance with applicable regulations: (1) the site's lack of street frontage; (2) the site's irregular shape; (3) the site's elevation below Union Turnpike; (4) the site's lack of critical infrastructure; (5) the site's excessive preparation costs; and (6) a deed restriction that limits the uses permitted at the site; and

WHEREAS, the applicant states that despite its substantial lot area, the site does not front on any mapped street and is accessed only by historic Creedmoor campus roads by right of easement; as such, the site is less desirable for conforming uses that require immediate access to the public street system for operational or practical purposes and therefore will command comparatively lower rents than sites of similar size; and

WHEREAS, the applicant asserts that while the lack of frontage is not unusual within Creedmoor, it is not the prevailing condition in the surrounding area; and

WHEREAS, the applicant states that the site has an unusual shape, in that it resembles the lateral half of an arrowhead with the tip removed; such shape in combination with the yards and distance between buildings requirements of the Zoning Resolution result in an inefficient use of the site; and

WHEREAS, the applicant states that the site is located approximately nine feet below the street grade of Union Turnpike; such elevation change results in additional site preparation costs; and

WHEREAS, the applicant states that the site lacks critical infrastructure, including water mains, site grading, paving (roads and sidewalks), curbs, hydrants, storm water drywells, sewer lines, and gas lines, which results in premium construction costs; and

WHEREAS, the applicant identifies a number of other unusual site preparation costs, which it states are related to the historic Creedmoor use and which, it asserts, contribute to the uniqueness of the site; these include costs related to: (1) substantial overgrowth of vegetation and debris that must be removed from the site prior to commencement of any work; (2) an obsolete underground system of pumps and pipes that must be closed and/or capped; (3) existing wells that must be filled and capped; (4) a concrete water storage tank that must be removed; (5) demolition of potentially-contaminated structures; and (5) removal of topsoil to a depth of 1'-6" due to concerns regarding contamination owing to the site's industrial use; and

WHEREAS, finally, the applicant states that the site is uniquely burdened by use restrictions contained in the deed; in particular, as noted above, by its terms the deed prohibits commercial uses at the site; further, the deed allows only (a) community facility uses and (b) ICCC-owned residences for the "aged"; therefore, unlike typical C8-1 sites, this site may only be used for two uses: a community facility (as-of-right) and/or senior housing (but not without a use variance or a rezoning); and

WHEREAS, thus, the applicant asserts that the site's unique combination of physical conditions—and their attendant premium construction costs—make a conforming development at the site impractical; and

WHEREAS, in addition, the applicant asserts that ICCC's programmatic need to provide a community cultural center and affordable housing for seniors creates practical difficulties in developing the site in conformance with the use regulations; and

WHEREAS, specifically, the applicant states that although the Original Application, which proposed 143 dwelling units, was designed to allow the site to provide permanent affordable housing for seniors, ICCC will endeavor to make the 57 dwelling units proposed in the Amended Application as affordable as possible; and

WHEREAS, the applicant also states that as-of-right development of the site—a six-story ambulatory diagnostic or treatment health care facility (Use Group 4) with 135,426 sq. ft. of floor area (1.63 FAR)—does not produce sufficient returns to offset the above-noted premium construction costs or result in a building that will satisfy ICCC's programmatic needs; and

WHEREAS, the Board is not persuaded that any of the following site characteristics has been shown to be both unique and a hardship: the site's lack of street frontage, irregular shape, elevation below Union Turnpike, or the deed restriction; and

WHEREAS, as to the lack of street frontage, the Board acknowledges that not fronting on a mapped street is unusual in certain neighborhoods, including the subject neighborhood (excluding the Creedmoor site); however, the applicant did not demonstrate that its lack of frontage created a practical difficulty in developing the site as-of-right; and

WHEREAS, as to the irregular shape, the Board finds that the site is irregular, to be sure, but the Board also finds that the impact of such irregularity is mitigated significantly by the large size of the site; and

WHEREAS, as to the elevation below Union Turnpike, the Board finds that the applicant did not substantiate the uniqueness of this condition and it did not explain how practical difficulties or unnecessary hardships arise from the condition; and

WHEREAS, as to the deed restriction, the Board observes that deed restrictions mandating a use contrary to the Zoning Resolution are rare; however, the record reflects that ICCC specifically negotiated the terms of the conveyance and agreed to the restrictions of the deed1; as such, this particular unique condition was self-created and therefore cannot be used to satisfy the (a) finding of ZR § 72-21; and

WHEREAS, nevertheless, the Board agrees with the applicant that the site's considerable lack of critical infrastructure is a unique physical condition that creates practical difficulties and unnecessary hardship in developing the site in conformance with the applicable zoning regulations; and

WHEREAS, the Board also recognizes that while some site preparation is required for virtually all sites, the subject site requires significantly more site preparation than the typical site; thus, site conditions that individually would not be considered unique can become unique when considered in the aggregate; and

WHEREAS, finally, the Board acknowledges ICCC's stated programmatic need to provide affordable housing for seniors and finds that such needs cannot be satisfied with an as-of-right development at the site; however, the Board rejects that such need, in and of itself, may be substituted for a finding of uniqueness, notwithstanding that ICCC is a non-profit corporation; and

WHEREAS, initially, the applicant contended that as a non-profit corporation, it did not have to demonstrate, per ZR § 72-21(b), that there is no reasonable possibility that the development of the site in conformance with the Zoning Resolution will bring a reasonable return; the applicant reasoned that because it was a non-profit satisfying its programmatic needs, it did not have to demonstrate a financial hardship; and

WHEREAS, the Board disagrees and notes that nothing in the Board's precedents or relevant case law allow non-profit organizations without educational and/or religious missions to rely exclusively on their programmatic needs to satisfy ZR § 72-21(a); and

WHEREAS, because the Board rejects ICCC's stated programmatic needs as the primary basis for satisfying 72-21(a), correspondingly, the Board finds it necessary for the applicant to satisfy ZR § 72-21(b); and

WHEREAS, thus, in addition to the proposal, the applicant examined the economic feasibility of constructing a six-story ambulatory diagnostic or treatment health care facility (Use Group 4) with 135,426 sq. ft. of floor area (1.63 FAR); and

WHEREAS, the applicant concluded that only the proposal results in an acceptable rate of return, making it economically viable; the applicant also states that only the proposal will allow ICCC to fulfill the portion of its non-profit mission to provide affordable housing for seniors; and

WHEREAS, the Board acknowledges the Opposition's concerns about ICCC's financial and technical ability to construct the building as proposed; however, such concerns do not provide a basis for the

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1 The Board also acknowledges, as discussed at length by the Opposition and by elected officials, that the New York State Inspector General published a report that identified a number of irregularities and misstatements in the negotiations between ICCC and DASNY over the site. The Board takes no position on the propriety of the transaction, except insofar as it does not credit the deed restriction as a unique physical condition. The Board also notes that neither the Inspector General, nor the New York State Attorney General has taken further action with respect to ICCC and/or the site.

Board to deny a variance application; and

WHEREAS, based upon its review of the applicant's economic analysis, 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 or allow ICCC to provide affordable housing for seniors; 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, in accordance with ZR § 72-21(c); and

WHEREAS, the applicant contends that the proposed residential use is more in keeping with nearby uses than uses that are permitted as-of-right in the subject C8-1 district; and

WHEREAS, the applicant states that the surrounding neighborhood is characterized by its diversity, both in terms of use and bulk; west and south of the site are various mid-rise Creedmoor facility buildings, including two approximately 15-story smoke stacks, and an adjacent salt dome that is approximately five stories; east of the site is a low-density residential neighborhood with mostly one- and two-story, single- and two-family homes; north of the site are additional Creedmoor buildings, including the approximately 20-story main hospital building, and the intersection of the Cross-Island Parkway and Union Turnpike, two major arterial roadways; and

WHEREAS, at hearing, some members of the Opposition expressed concerns regarding the development of the site with anything other than community facility uses, while others opposed the community facility itself, citing concerns regarding traffic, parking, the loss of trees and open space, and the altering of the street system to accommodate development at the site; and

WHEREAS, in addition, the Opposition stated that the proposed height and multi-family use was not in keeping with the low-rise neighborhoods east and south of the site and would negatively affect property values; and

WHEREAS, the Board finds that while the Original Application was not compatible with the surrounding neighborhood, the Amended Application reflects an appropriate intermediate height between the mid- to high-rise buildings of the Creedmoor campus and the low-rise buildings to the south and east of the site; as to the multifamily use, the Board finds that it is: (1) necessary to defray the costs associated with the unique hardships of the site; (2) in furtherance of ICCC's stated programmatic needs to provide affordable housing for seniors; and (3) significantly more compatible with the homes in the nearby R2A district than the majority of uses that are permitted as-of-right in the subject C8-1 district; and

WHEREAS, as to general concerns regarding the proposed community facility use, the Board notes that community facility uses are permitted as-of-right in the subject C8-1 district and have maximum permitted FAR of 2.4; thus, this particular community facility will be, at 0.12 FAR, nearly one-twentieth of its permitted size; and

WHEREAS, turning to bulk, as noted above, through the hearing process and in response to concerns articulated by the Opposition and by the Board, the applicant significantly scaled down the size and changed the nature of the project, from two nine-story mixed residential and community facility buildings with heights in excess of 95 feet and a total of 143 dwelling units and 177,910 sq. ft. of floor area (2.14 FAR) to one four-story mixed residential and community facility building with a maximum building height of less than 45 feet, 57 dwelling units, and 66,563 sq. ft. of floor area (0.80 FAR); and

WHEREAS, the applicant states that while the proposed 0.8 FAR is higher than the 0.5 FAR permitted in the nearby R2A district, it is fully one-third the maximum permitted community facility FAR at the site (2.4 FAR); and

WHEREAS, the applicant also notes that the proposed building height of 43'-6" reflects a building height that is only 8'-6" taller than the maximum permitted building height in the adjacent R2A district (35'-0"); the applicant asserts that the proposed height is mitigated by the location of the building on the northwest portion of the site, approximately 30 feet away from the rear lot lines of the adjacent R2A sites, and by the provision of substantial buffering (trees) along the shared boundary with the R2A sites; and

WHEREAS, as to traffic and parking, the Board notes that it directed the applicant to provide traffic and parking analyses and such analyses revealed that the Amended Application—which includes 75 parking spaces—will not have a significant impact on either traffic or parking; and

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

WHEREAS, the Board also finds that, consistent with ZR § 72-21(d), the unique hardships acknowledged by the Board herein were not created by the owner or a predecessor in title, but are a function of the site's historic use as part of the Creedmoor campus; and

WHEREAS, finally, the Board finds that the Amended Application is the minimum variance necessary to afford relief, as set forth in ZR § 72-21(e); the Board notes that the minimum variance necessary was achieved following numerous hearings, hours of public testimony,

months of scrutiny by Board members, and three major design revisions by the applicant; and

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

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

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 11-BSA-104Q, dated February 21, 2015; 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 Department of Environmental Protection recommends that an "E" designation for hazardous materials be placed on the site as part of the approval; and

WHEREAS, the "E" designation requires an environmental review by the New York City Office of Environmental Remediation ("OER"), which must be satisfied before DOB will issue building permits for the property; and

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

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

Therefore it is Resolved, that the Board of Standards and Appeals issues a Negative Declaration, 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 a C8-1 zoning district, the construction of a four-story mixed residential (Use Group 2) and community facility (Use Group 4) building with 57 dwelling units for persons 55 years of age or older, contrary to ZR § 32-11, *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 March 5, 2015"- nine (9) sheets; and *on further condition*:

THAT the following shall be the bulk parameters of the site and building: four stories, a maximum of 66,563 sq. ft. of floor area (0.80 FAR) (10,380 sq. ft. of community facility floor area and 56,183 sq. ft. of residential floor area), a maximum of 57 dwelling units, 75 parking spaces, and yards, open space, and site-circulation and configuration as set forth in the BSA-approved plans;

THAT an E designation (E-360) is placed on the site to ensure proper hazardous materials remediation;

THAT the occupancy of the dwelling units shall be limited to persons 55 years of age or older;

THAT no commercial catering shall be permitted at the site;

THAT landscaping shall be in accordance with the BSA-approved plans;

THAT any change in the owner or operator of the site shall be subject to the Board's approval;

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

THAT all DOB and related agency application(s) filed in connection with the authorized use and/or bulk shall be signed off by DOB and all other relevant agencies by March 10, 2019;

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

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

THAT DOB 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, March 10, 2015.

A true copy of resolution adopted by the Board of Standards and Appeals, March 10, 2015.
Printed in Bulletin No. 12, Vol. 100.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.

CERTIFIED RESOLUTION

Margery Perlmutter, R.A., Esq.
Chair/Commissioner of the Board