BULLETIN

OF THE
NEW YORK CITY BOARD OF STANDARDS
AND APPEALS

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

Volume 92, Nos. 39-41 October 25, 2007

DIRECTORY

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

CALENDAR

NOVEMBER 20, 2007, 10:00 A.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday morning, November 20, 2007, 10:00 A.M., at 40 Rector Street, 6th Floor, New York, N.Y. 10006, on the following matters:

SPECIAL ORDER CALENDAR

146-59-BZ
APPLICANT – Larry Dean Merritt, for Larry Dean Merritt, owner.
SUBJECT – Application June 20, 2007 – Z.R. §11-411 for the Extension of Term of a previously granted variance for the operation of a (UG8) parking lot which expired on May 6, 2007 in an R8 zoning district.
PREMISES AFFECTED – 686-88 Gerard Avenue, east side 180' north of 153rd Street, Block 2473, Lot 8, Borough of Bronx.
COMMUNITY BOARD #

APPEALS CALENDAR

64-07-A
APPLICANT – Stuart A. Klein, Esq., for Sidney Frankel, owner.
SUBJECT – Application March 12, 2007 – An appeal seeking a determination that the owner of said premises has acquired a common law vested right to continue development commenced under the prior R6 zoning district regulations. R4-1 zoning district.
PREMISES AFFECTED – 1704 Avenue N, a/k/a 1702-04 – 1411-1421 East 17th Street, southeast corner lot at intersection of East 17th Street and Avenue N, Block 6755, Lot 1, Borough of Brooklyn.
COMMUNITY BOARD #14BK

140-07-A
APPLICANT – Rothkrug Rothkrug & Spector, LLP
Owner: Breezy Point Cooperative, Incorporated
Lessee: Thomas Carroll
SUBJECT – Application May 25, 2007 – Appeals seeking to reverse the Department of Building's decision to revoke permits and approvals for a one family home. R4 Zoning district.
PREMISES AFFECTED – 607 Bayside Drive, North west intersection of Bayside Drive and zoning street know as Service Lane, Block 16350, Lot 300, Borough of Queens.
COMMUNITY BOARD #14Q

NOVEMBER 20, 2007, 1:30 P.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday afternoon, November 20, 2007, at 1:30 P.M., at 40 Rector Street, 6th F0-loor, New York, N.Y. 10006, on the following matters:

ZONING CALENDAR

68-07-BZ
APPLICANT – Jeffrey A. Chester, Avram Babadzhanov, owner; Congregation Rubin Ben Issac Haim, lessee.
SUBJECT – Application March 22, 2007 – Under §72-21 – Proposed community facility synagogue, which does not comply with front and side yard requirements.
PREMISES AFFECTED – 102-48 65th Road, southwest corner Yellowstone Boulevard and 65th Road, Block 2130, Lot 37, Borough of Queens.
COMMUNITY BOARD #6Q

111-07-BZ
APPLICANT – Harold Weinberg, P.E., for Javier Galvez, owner .
SUBJECT – Application May 4, 2007 – Special Permit (§73-622) for the In-Part Legalization of an enlargement to a single family home. This application seeks to vary lot coverage, open space and floor area (§23-141) and side yard (§23-461) in an R3-1 zoning district. It is also proposed to remove the non-complying roof and replace with a complying one.
PREMISES AFFECTED – 155 Norfolk Street, east side, 325' north of Oriental Boulevard, between Oriental Boulevard and Shore Parkway, Block 8757, Lot 34, Borough of Brooklyn.
COMMUNITY BOARD #15BK

173-07-BZ
APPLICANT – Sheldon Lobel, P.C., for Gitty Gubitz-Rosenberg, owner.
SUBJECT – Application June 21, 2007 – Special Permit (§73-622) for the enlargement of an existing single family residence. This application seeks to vary floor area and open space ratio (§23-141(a)); side yard (§23-461(a)) and less than the required rear yard (§23-47) in an R-2 zoning district.
PREMISES AFFECTED – 1061 East 21st Street, located on the east side of East 21st Street between Avenue I and Avenue J, Block 7585, Lot 33, Borough of Brooklyn.
COMMUNITY BOARD #14BK

181-07-BZ
APPLICANT – Omnipoint Communications Inc., for Pat Quadrozzi, owner; Omnipoint Communications Inc., lessee.
SUBJECT – Application July 20, 2007 – Special Permit (§73-30) For a proposed 20-foot extension to an existing 50-foot non-accessory radio tower and related equipment at grade.
PREMISES AFFECTED – 72-18 Amstel Boulevard, north side of Amstel Boulevard between 72nd Street, and Beach 73rd Street, Block 16070, Lot 13, Borough of Queens.
COMMUNITY BOARD # 14Q

Jeff Mulligan, Executive Director

MINUTES

REGULAR MEETING
TUESDAY MORNING, OCTOBER 16, 2007
10:00 A.M.

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

SPECIAL ORDER CALENDAR

142-70-BZ
APPLICANT – Barbara Hair, Esq., for Target Realty LLC, owner.
SUBJECT – Application December 12, 2006 – Amendment to a variance previously approved pursuant to section 72-21 of the zoning resolution which allowed commercial office space (Use Group 6) on the cellar level of a residential building located in a R7-2 zoning district. The application seeks a change of use in the existing commercial space on the cellar level from Use Group 6 office to Use Group 6 store.
PREMISES AFFECTED – 8 St. Marks Place, south side, 126' east of 3rd Avenue, Block 463, Lot 13, Borough of Manhattan.
COMMUNITY BOARD #3M
APPEARANCES –
For Applicant: Barbara Hair.
ACTION OF THE BOARD – Application denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson.....4
THE RESOLUTION:

WHEREAS, this is an application for an amendment to an existing variance, which allowed commercial office space on the cellar level of a residential building located in an R7-2 zoning district, seeking a change of use from office use to a Use Group 6 store; and

WHEREAS, the decision of the Manhattan Borough Commissioner of the Department of Buildings, acting on Department of Buildings Application No. 104586663BSA, reads in pertinent part:

> "Change of non conforming use (office in R-2 Zoning District) to store also a non conforming use.
> BSA approval required.
> Proposed Use Group 6 in R7-2 zoning district is contrary to ZR 23-00. BSA variance per 72-00 is required;" and

WHEREAS, after due notice by publication in *The City Record*, a public hearing was held on this application on May 15, 2007, which was continued on June 19, 2007 and July 17, 2007; after an adjournment of the July 17, 2007 hearing to September 11, 2007, the hearing was then closed, with the record kept open for a final submission, and then to decision on October 16, 2007; and

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

WHEREAS, Community Board 3, Manhattan, recommended disapproval of this application, based on the alleged failure by the landlord to demonstrate an inability to rent the cellar space for office use and the landlord's alleged prior efforts to rent the cellar space illegally for retail use; and

WHEREAS, numerous local residents and representatives of local elected representatives testified in opposition to the amendment;

WHEREAS, the subject site is located on the south side of St. Marks Place between Third and Second Avenues, Manhattan, within an R7-2 zoning district; and

WHEREAS, the subject site is occupied by a five-story building with cellar; and

WHEREAS, on June 30, 1970, under the subject calendar number, the Board granted a variance, pursuant to ZR § 72-21, to permit the conversion of an approximately 1,000 sq. ft. portion of cellar space to office use on condition that there be no business signs on the exterior of the premises other than a non-illuminated name plate not exceeding three sq. ft.; and

WHEREAS, the certificate of occupancy subsequently issued by the Department of Buildings on December 16, 1971 limited the occupancy of the cellar space to eight persons; and

WHEREAS, following its acquisition in 2002, the applicant filed an application with the Department of Buildings to convert the cellar space to restaurant use; and

WHEREAS, subsequent to issuance of the building permit, the Department of Buildings moved to revoke it under ZR Section 52-60 when the applicant failed to provide proof of continuous use; and

WHEREAS, following an appeal to this Board, the Department of Buildings rescinded the revocation in 2004 and reinstated the permit; and

WHEREAS, the applicant then submitted the subject application to amend the variance to change the use of cellar space from office use to Use Group 6 (Retail); and

WHEREAS, the applicant represented that such an amendment was necessary and appropriate due to changes in the market that make office space unmarketable in this community, that a change to retail use would be minimal in light of the small size of space and the prevailing neighborhood character; and

WHEREAS, during the course of the hearing, the Board raised questions as to why it was necessary to broaden the uses on the site to include a UG 6 retail use, whether office space was feasible on the site and what the effect of office rent revenue would be on the financial feasibility of the overall zoning lot; and

WHEREAS, the Board also sought to learn how long the subject site had been vacant, and about the outcome of efforts to market the site for office space allowed under the variance or community facility use, which would be permitted under the zoning; and

WHEREAS, the applicant contended that the change in use was necessitated by the lack of market demand for office space, as evidenced by the site's longstanding vacancy – conceded to be at least 26 years, and

WHEREAS, the applicant further represented that the

conversion of two pre-existing offices on the block to retail and restaurant use in 1991 and 2002, respectively, and the nonexistence of any current cellar office space evidenced the lack of demand for office space; and

WHEREAS, the Board neither agrees that the conversion of two former office spaces is dispositive, nor that a lack of current offices nearby demonstrates that no market exists for office or community facility use at the subject site; and

WHEREAS, the applicant claimed that "substantial efforts" were made to market the site during a four month period from February 2005 until May 2005 -- by affixing an advertising sign to the exterior of the building and a web posting -- and that no inquiries resulted from either office tenants or community facilities; and

WHEREAS, the applicant further questioned the Board's authority to inquire as to the history of marketing of the site in this case, inasmuch as other applicants for amendments were not asked to document prior marketing efforts; and

WHEREAS, it is within the Board's authority to evaluate an amendment to a previous grant as it may implicate the findings made by the Board at that time; and

WHEREAS, the Board evaluates each case individually and the question of marketing is indisputably relevant to any case in which an applicant claims that an amendment is necessary because no market exists for the use permitted by a variance; and

WHEREAS, the Board was not persuaded that four months of marketing during a 26-year period of vacancy was substantial enough to prove that no market existed for office or community facility use at the subject site; and

WHEREAS, as opposed to proving the lack of an office space market at the subject site, the 26-year vacancy suggests instead that the former hardship may have been eliminated or, at a minimum, significantly reduced; and

WHEREAS, the Board therefore asked whether economic hardship still existed on the site or whether there had been a change in its financial return of the zoning lot since the variance was granted; and

WHEREAS, the applicant insisted that the original variance was based on a finding of practical difficulty, rather than a demonstration of unnecessary financial hardship, and

WHEREAS, the applicant further argued that the practical difficulty was in complying with the expiration of the 1967 Multiple Dwelling Law, which allegedly made residential occupancy of the cellar space illegal; and

WHEREAS, the Board's records, however, note that the original basis for relief instead included the occupancy of rent controlled units on the above floors and financial analyses showing that the revenues generated by the cellar would offset the low rents of the apartments; and

WHEREAS, testimony by the applicant, as well as testimony and documents submitted by other witnesses, indicated that the present status of the building includes a mix of rent-stabilized and market rate apartments; and

WHEREAS, in the absence of evidence otherwise, the Board questions why the claimed hardship that was the basis for the original grant is not relieved by the addition of these market rate units; and

WHEREAS, the applicant further argued that the Board lacked authority to assess whether there had been a change in the site's financial return since the variance was granted, based on the Court of Appeals holding in St. Onge v. Town of Colonie; and

WHEREAS, the St. Onge case concerns a revocation of a variance, and no such revocation is contemplated in this case; and

WHEREAS, the Board finds that the applicant entirely misapplied the decision in St. Onge, which did not address the financial basis underlying the grant of a variance, but in fact held that conditions on the grant of a variance must relate to the use of the property that is the subject of the variance without regard to the person who owns or occupies that property (71 N.Y.2d 507 (1988)); and

WHEREAS, the Court in St. Onge further held that "a zoning board may, where appropriate, impose reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property and aimed at minimizing the adverse impact to an area that might result from the grant of a variance" (71 N.Y.2d 515-16); and

WHEREAS, the Board concludes that St. Onge therefore imposes a duty on the Board to review the original findings, because the amendment would allow a greater number of uses on the site, and increase the occupancy of the cellar space and the number of hours in which it would be occupied; and

WHEREAS, the amendment would affect the minimum variance finding which requires the Board to grant the minimum relief necessary to make a reasonable financial return; and

WHEREAS, the Board determines that the applicant has failed to establish that the proposed addition of retail use to the subject site would be the minimum relief necessary; and

WHEREAS, the applicant contends that the change in use is appropriate because a variance for such a change would not have been necessary had the office use been as of right under ZR Section 52-34; and

WHEREAS, the Board finds, however, that application of ZR Section 52-34 would be entirely useless to the applicant, since (a) ZR Section 52-34 would not apply to a case involving a variance, and (b) had the office use actually qualified as a grandfathered non-conforming use under ZR Section 52-34, then any Use Group 6 non-conforming use have been extinguished by the discontinuance of the use for a period in excess of two years by under ZR Section 52-60; and

WHEREAS, based on a thorough review of the record and testimony, the Board finds that the applicant has failed to establish that the amendment is appropriate and necessary.

Therefore it is Resolved that the Board of Standards and Appeals denies the application to reopen and amend the resolution, said resolution having been adopted on June 30, 1970; and

THAT all conditions from the prior resolution shall remain in effect.

Adopted by the Board of Standards and Appeals, October 16, 2007.

515-89-BZIII
APPLICANT – Sheldon Lobel, P.C., for 50 East 78th Street, L.P., owner.
SUBJECT – Application July 20, 2007 – Extension of Term of a Special Permit for a (UG6) commercial art gallery in the basement portion of a residential building which expires on October 16, 2007 in an R8B (LH-1A) zoning district.
PREMISES AFFECTED – 50 East 78th Street, East 78th Street, between Madison Avenue and Park Avenue, Block 1392, Lot 47, Borough of Manhattan.
COMMUNITY BOARD #8M
APPEARANCES –
For Applicant: Ron Mandel.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson....4
Negative:.....0
THE RESOLUTION:

WHEREAS, this is an application for a reopening and an extension of the term for a previously granted variance for an art gallery, which expired today, October 16, 2007; and

WHEREAS, a public hearing was held on this application on September 18, 2007 after due notice by publication in *The City Record*, and then to decision on October 16, 2007; and

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

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

WHEREAS, the subject premises is located on the south side of East 78th Street, between Madison Avenue and Park Avenue; and

WHEREAS, the site is located within an R8B zoning district, within the Limited Height 1a district, and is occupied by an 11-story residential building; and

WHEREAS, on July 17, 1962, under the subject calendar number, the Board granted a variance to permit a change in use of a portion of the basement to an art gallery for a term of five years; and

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

WHEREAS, most recently, on May 11, 1999, the grant was extended for a period of ten years, to expire on October 16, 2007; and

WHEREAS, the instant application seeks to extend the term of the variance; and

WHEREAS, the applicant does not propose any other changes; and

WHEREAS, based upon its review of the record, the Board finds that a ten-year extension of term is appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *reopens* and *amends* the resolution, dated July 17, 1962, so that as amended this portion of the resolution shall read: "to grant an extension of the special permit for a term of ten years from the expiration of the last grant to expire on October 16, 2017; *on condition* that any and all work shall substantially conform to drawings as they apply to the objections above noted; and *on further condition*:

THAT this grant shall expire on October 16, 2017;

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

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

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

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

(DOB Application No. 104798710)

Adopted by the Board of Standards and Appeals, October 16, 2007.

841-76-BZ
APPLICANT – Anthony M. Salvati, for HJC Holding Corporation, owner.
SUBJECT – Application December 5, 2006 – Extension of Term/Amendment for previously approved variance, under BSA calendar numbers 841-76-BZ and 78-79-BZ, granted pursuant to §72-21 which permitted on the premises auto wrecking and junk yard for auto parts (UG 18), sale of new and used cars and auto repair shop (UG 16), and sale of new and used parts (UG 6) not permitted as of right in a R4 zoning district. The amendment seeks to legalize the change in use from the previously mentioned to open commercial storage bus parking, repairs and sales (UG 16 & 6).
PREMISES AFFECTED – 651 Fountain Avenue, north east corner of Fountain Avenue and Wortman Avenue, Block 4527, Lots 61, 64, 77, 78, 80, 85, 11, Borough of Brooklyn.
COMMUNITY BOARD #5BK
APPEARANCES –
For Applicant: Peter Hirshman.

ACTION OF THE BOARD – Laid over to January 29, 2008, at 10 A.M., for continued hearing.

78-79-BZ
APPLICANT – Anthony M. Salvati, for HJC Holding Corporation, owner.
SUBJECT – Application December 5, 2006 – Extension of Term/Amendment for previously approved variance, under BSA calendar numbers 841-76-BZ and 78-79-BZ, granted pursuant to §72-21 which permitted on the premises auto wrecking and junk yard for auto parts (UG 18), sale of new and used cars and auto repair shop (UG 16), and sale of new and used parts (UG 6) not permitted as of right in a R4

zoning district. The amendment seeks to legalize the change in use from the previously mentioned to open commercial storage bus parking, repairs and sales (UG 16 & 6).
PREMISES AFFECTED – 671 Fountain Avenue, north east corner of Fountain Avenue and Stanley Avenue, Block 4527, Lots 94 and 110, Borough of Brooklyn.
COMMUNITY BOARD #5BK
APPEARANCES –
For Applicant: Peter Hirshman.

ACTION OF THE BOARD – Laid over to January 29, 2008, at 10 A.M., for continued hearing.

997-84-BZ
APPLICANT – Stadtmauer Bailkin, LLP, for 222 Union Associates, owner.
SUBJECT – Application March 2, 2007 – Extension of Term/Amendment/Waiver for a special permit which expired on September 10, 2005, to revise the BSA plans to reflect existing conditions utilizing the Board's formula for attended parking of one space per 200 square feet, and the legalization of the existing automobile lifts within the parking garage.
PREMISES AFFECTED – 800 Union Street, southside of Union Street, between 6th and 7th Avenues, Block 957, Lot 29, Borough of Brooklyn.
COMMUNITY BOARD #6BK
APPEARANCES –
For Applicant: Calvin Wong.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 10 A.M., for continued hearing.

223-90-A
APPLICANT – Rothkrug, Rothkrug & Spector LLP, for Frank A. Burton, Jr., owner.
SUBJECT – Application April 3, 2007 – Amendment of a previous grant under the General City Law Section 36 to remove a Board condition requiring that no permanent Certificate of Occupancy shall be issued until a Corporation Counsel Opinion of Dedication has been obtained for Kresicher Street and to approve the enlargement of the site and building. M1-1 Zoning district.
PREMISES AFFECTED – 114 Kreischer Street, west side of Kreischer Street, 140.8' north of Androvette Street, Block 7408, Lot 8, Borough of Staten Island.
COMMUNITY BOARD #3SI
APPEARANCES –
For Applicant: Calvin Wong.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 10 A.M., for continued hearing.

139-92-BZ
APPLICANT – Samuel H. Valencia, for Valencia Enterprises, owner.
SUBJECT – Application March 9, 2007 – Extension of Term for a UG12 eating and drinking establishment with dancing located on the first floor of a three story, mixed use building with residences on the upper floors in a C2-2/R-6 zoning district.
PREMISES AFFECTED – 52-15 Roosevelt Avenue, north side 125.53' east of 52nd Street, Block 1315, Lot 76, Borough of Queens.
COMMUNITY BOARD #3Q
APPEARANCES –
For Applicant: Dianna C. Valencia.

ACTION OF THE BOARD – Laid over to October 16, 2007, at 10 A.M., for continued hearing.

175-95-BZ
APPLICANT – H Irving Sigman, for Twi-light Roller Skating Rink, Incorporated, owner.
SUBJECT – Application April 25, 2007 – Extension of Term/Amendment/Waiver – To permit at the first floor level the extension of the existing banquet hall (catering establishment), (UG9) into an adjourning unoccupied space, currently designated as a store, (UG6) located in an C1-2/R3-2 zoning district.
PREMISES AFFECTED – 205-35 Linden Boulevard, North south 0' east of the corner formed by Linden Boulevard & 205th Street, Block 11078, Lot 1, Borough of Queens.
COMMUNITY BOARD # 12Q
APPEARANCES –
For Applicant: Alan Sigman and Frank Williams.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 10 A.M., for continued hearing.

189-99-BZ
APPLICANT – Kenneth H. Koons, for 460 Quincy Avenue Realty Corporation, owner.
SUBJECT – Application September 12, 2007 – Extension of Term for a variance previously granted for the operation of a UG6 grocery store (Nana Food Center), with a one family dwelling above, in an R3-A zoning district which expired on November 14, 2005; for the Extension of Time to obtain a C of O which expired on February 3, 2004; for an amendment to legalize the increase in signage and a waiver of the rules of practice and procedure.
PREMISES AFFECTED – 460 Quincy Avenue, southeast corner of Dewey Avenue and Quincy Avenue, Block 5578, Lot 1, Borough of Bronx.
COMMUNITY BOARD #10BX
APPEARANCES –
For Applicant: Kenneth Koons.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson..4
Negative:.....0

ACTION OF THE BOARD – Laid over to November 20, 2007, at 10 A.M., for decision, hearing closed.

8-05-BZ
APPLICANT – Sheldon Lobel, P.C., for James Pi, owner.
SUBJECT – Application January 18, 2005 – To consider dismissal for lack of prosecution – propose use, bulk and parking variance to allow a 17 story mixed-use building in R6/C1-2 and R5 zoning districts.
PREMISES AFFECTED – 85-15 Queens Boulevard, a/k/a 51-35 Reeder Street, entire frontage on Queens Boulevard between Reeder Street and Broadway, Block 1549, 41 (a/k/a 41 & 28), Borough of Queens.
COMMUNITY BOARD # 4Q
APPEARANCES –
For Applicant: Jordan Most.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson..4
Negative:.....0

ACTION OF THE BOARD – Laid over to November 20, 2007, at 10 A.M., for decision, hearing closed.

APPEALS CALENDAR

320-06-A
APPLICANT – Rothkrug, Rothkrug and Spector, for Furman LLC, owner.
SUBJECT – Application December 11, 2006 – An appeal challenging DOB's interpretation of their DOB Memo 9/21/86 in which compliance with the special provisions of §23-49 (a) & (c) are applicable to the current design of the proposal when the party walls are utilized or shared for 50% or more of the depth of the building. R5 zoning district.
PREMISES AFFECTED – 4368 Furman Avenue, between East 236th and East 237th, Block 5047, Lot 12, Borough of Bronx.
COMMUNITY BOARD #12BX
APPEARANCES –
For Administration: Mark Davis, Department of Buildings.
ACTION OF THE BOARD – Application denied.
THE VOTE TO GRANT –
Affirmative:.....0
Negative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson...4
THE RESOLUTION: 1

WHEREAS, the instant appeal comes before the Board in response to a denial from the Bronx Borough Commissioner, dated August 22, 2005 and updated June 23, 2006 and November 14, 2006 (the "Denial"); and

WHEREAS, the Denial was issued in response to a request by the owner of 4368 Furman Avenue (the "Appellant," and the "Subject Building"), that DOB reconsider the stop work order it issued for the Subject Building; and

WHEREAS, this appeal challenges DOB's interpretation of ZR § 23-49 and a DOB memo, dated September 2, 1986, (the "1986 Memo"), and the resultant determination that the Subject Building does not comply with zoning district regulations; and

WHEREAS, the Denial reflects DOB's position that a side yard with a minimum width of 8'-0" is required along the northern property line due to the existing adjacent built conditions on that lot line; and

WHEREAS, as reflected in the Denial, DOB refuses to reinstate the permits associated with the Subject Building; and

WHEREAS, the Denial reads in pertinent part:

> These issues were discussed with technical affairs and at previous BCTM [Borough Commissioners Technical Meeting]:
> - Intent of memo is to cover both party walls and independent walls, as also indicated in ZR 23-49(a).
> - Current design of the project is not in compliance with the memo ". . . 50% or more of the depth of the building. . ."
> - If X [the portion of the existing building on the lot line] ≥ 50% of Y [the full depth of the existing building] then proposed building may enjoy party/independent wall of ZR 23-49.
>
> As a result, your current design is not in compliance. This reconsideration is denied; and
> (*A sketch of this interpretation and the noted calculations was included with the Denial.)*

HEARINGS

WHEREAS, a public hearing was held on this appeal on May 8, 2007, after due notice by publication in *The City Record*, with Continued hearings on June 5, 2007, July 24, 2007, and August 21, 2007, and then to decision on September 25, 2007; the decision was deferred to October 16, 2007; and

PARTIES AND SUBMITTED TESTIMONY

WHEREAS, the Appellant and DOB were represented by counsel in this proceeding; and

WHEREAS, the Appellant and DOB made submissions to the Board on the interpretation of ZR § 23-49 and applicable standards for interpreting the ZR; and

WHEREAS, the drafter of the 1986 Memo, George Berger, provided testimony on the intent of the memo on the Appellant's behalf; and

WHEREAS, at DOB's request, counsel to the Department of City Planning (DCP) submitted a letter dated July 9, 2007 (the "DCP Letter") discussing the legislative intent of the provisions of the Zoning Resolution in question and the reasonableness of DOB's interpretation; and

THE SITE

WHEREAS, the site comprises one zoning lot, Lot 12, which is proposed to be subdivided into two tax lots; tax lot 12 (4368 Furman Avenue, the Subject Building) is located on the north side of the site and tax lot 11 (4366 Furman Avenue) is located on the south side of the lot; and

WHEREAS, the combined site is irregularly shaped, with a width ranging from 41.93 feet to 55.78 feet and a

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

depth of 97.5 feet along the subject northern lot line; it is located within an R5 zoning district; and

WHEREAS, the plans provide for the construction of two semi-detached three-story, three-family buildings – the Subject Building and its mirror image at 4366 Furman Avenue; and

WHEREAS, only the Subject Building at 4368 Furman Avenue has been determined to be non-complying and is at issue in this appeal; 4366 Furman Avenue has been completed and has obtained its certificate of occupancy; and

WHEREAS, semi-detached buildings are permitted within the zoning district and the side yard regulations require that there be one side yard with a minimum width of 8'-0" for each semi-detached building; and

WHEREAS, the building at 4366 Furman Avenue provides one side yard with a width of 8'-0" at its south lot line; the Subject Building is built to the northern lot line and does not provide any side yard for the entire length of the building; and

WHEREAS, the adjacent site to the north, 4382 Furman Avenue, is occupied with a six-story multiple dwelling building (the "Existing Building"), constructed in approximately 1931; and

WHEREAS, the Existing Building is built to its front property line and extends along the subject side property line to a depth of 30 feet (as per the Appellant's representations), at which point it sets back at the side to provide a side yard for the remaining depth of the building; the depth of its lot is also approximately 97.5 feet; and

WHEREAS, the Appellant represents that the Subject Building provides the required front yard with a depth of 18 feet and the required rear yard with a depth of 30 feet; and

WHEREAS, the Appellant represents that the proposal complies with all zoning district regulations except those raised in the Denial; and

PRE-BOARD PROCEDURAL HISTORY

WHEREAS, on October 24, 2003, the owner filed an application at DOB to develop the site; and

WHEREAS, on or about December 5, 2003, DOB issued an Objection Checklist for New Buildings and Alterations (the "Checklist"); and

WHEREAS, the Checklist cites to "marked up zoning calculations," but does not reference ZR § 23-49 or the 1986 Memo; and

WHEREAS, the Appellant represents that the project architect states that a side yard issue was raised on the "marked up" plans noted on the Checklist, that the issue was then discussed with a DOB examiner, resolved by December 5, 2003, and the plans were ultimately approved; and

WHEREAS, the Appellant represents that the noted "marked up" plans were not retained by the architect; and

WHEREAS, the Board notes that no evidence was submitted into the record to document these earlier plans and communication about this objection or any other objections; and

WHEREAS, DOB records reflect that plans were approved on December 12, 2003 and work permits were issued on February 20, 2004; and

WHEREAS, the Appellant represents that construction commenced shortly thereafter; and

WHEREAS, the Appellant represents that construction continued on both buildings until May 2005 when, in response to a complaint that the building did not comply with zoning district regulations, DOB audited the plans; and

WHEREAS, as a result of the audit, DOB issued stop work orders against the Subject Building and 4366 Furman Avenue; and

WHEREAS, the stop work order against 4366 Furman Avenue was lifted, but remained on the Subject Building; and

WHEREAS, as noted, DOB rejected a proposed reconsideration on August 22, 2005 (the Denial) and determined that the proposed lot line condition did not comply with the 1986 Memo; and

WHEREAS, on December 1, 2006, the applicant obtained a certificate of occupancy for 4368 Furman Avenue; and

WHEREAS, the applicant now seeks to complete construction of the Subject Building pursuant to the approved plans and to obtain a certificate of occupancy; and

ISSUES PRESENTED

WHEREAS, the Appellant makes the following primary arguments in support of its position that DOB should reinstate the permit for the Subject Building: (1) the plans comply with a prior DOB interpretation of the 1986 Memo, (2) ZR § 23-49 is ambiguous and does not provide specific guidance as to when the side yard waiver applies, (3) DOB is arbitrary in its application of interpretations of ZR § 23-49 and the 1986 Memo, and (4) the doctrine of statutory interpretation dictates that an ambiguous statute be resolved in favor of the property owner; and

WHEREAS, these arguments will be addressed below; and

WHEREAS, the Board notes that the Appellant modified its arguments throughout the hearing process and that the arguments noted above reflect the current iteration; and

WHEREAS, the Appellant also advanced a supplementary argument that, if the Board were to uphold DOB's interpretation, then the Appellant has a vested right to complete construction under an alternate interpretation of ZR § 23-49; this argument is also discussed below; and

ZR § 23-49 AND THE 1986 MEMO

WHEREAS, ZR § 23-49 - Special Provisions for Party or Side Lot Line Walls – sets forth the exceptions for side yards on a lot adjacent to a lot with a side lot line wall in certain zoning districts; and

WHEREAS, ZR § 23-49 addresses exceptions to the side yard provisions for residential buildings with more than two dwelling units, like the Subject Building, set forth in ZR § 23-462 - Side Yards for All Other Residential Buildings; and

WHEREAS, the conditions for the exceptions to the side yard requirements as set forth in ZR § 23-49 are "a *residence* may be constructed so as to: (a) utilize a party wall or party walls, or abut an independent wall or walls along a *side lot line*, existing on December 15, 1961 or lawfully erected under the terms of this Resolution . . . If a

residence is so constructed, the *side yard* requirements shall be waived along that boundary of the *zoning lot* coincident with said party wall or party walls, or independent wall or walls along a *side lot line*, and one *side yard* shall be provided along any *side lot line* of the *zoning lot* where such a wall is not so utilized, at least eight feet wide"; and

WHEREAS, the 1986 Memo has the subject heading Special Provision for Party or Side Lot Line Walls Section 23-49 Zoning Resolution; the portion of the memo at issue reads: "[t]he special provisions of Section 23-49(a) & (c) are applicable when the party walls are utilized or shared for 50% or more of the depth of the building"; and

WHEREAS, only § 23-49(a), and not § 23-49(c), is relevant to this appeal; and

The Compliance of the Subject Building

WHEREAS, the Appellant contends that the Subject Building complies with an interpretation of the 1986 Memo which provides that a new building need only share the lot line wall of an existing adjacent building for 50 percent of the depth of that lot line wall in order to be able to extend the new building's wall along the shared lot line for its entire length; and

WHEREAS, DOB disagrees that this is the relevant interpretation and finds that the Subject Building does not comply with ZR § 23-49, under its interpretation (the "Proffered Interpretation"), which follows the 1986 Memo; and

WHEREAS, the Board agrees with DOB that the Subject Building does not comply with the Proffered Interpretation; and

The Interpretation of ZR § 23-49

WHEREAS, all parties agree that the text of ZR § 23-49 does not set parameters under which the side yard exception is applicable; specifically, it does not state what minimum amount of an existing building, by linear dimension or percentage, must be on the lot line or what linear dimension or percentage of a new building's lot line wall must overlap the existing adjacent lot line wall; and

- Appellant's Argument

WHEREAS, the Appellant initially argued that the owner began construction based on the plain meaning of ZR § 23-49 that if a portion of an adjacent existing building is along the lot line, then the side yard may be waived along that entire side lot line, "coincident" to that lot line wall, in order for the exception to apply; and

WHEREAS, the Appellant ultimately adopted the interpretation of ZR § 23-49 as interpreted by the drafter of the 1986 Memo, Mr. Berger (the "Berger Interpretation"), which is described below; and

WHEREAS, the Board notes that at the first hearing, the Appellant conceded that, although the language of the statute is broad, the drafters did not intend for a new building that abuts an existing adjacent building, which only has a very small portion (such as one or two feet), of its side wall built to the lot line, to be able to take advantage of the ZR § 23-49(a) exception; and

- Legislative Intent

WHEREAS, since the statute is ambiguous in that it does not set forth guidelines for the applicability of the side yard exemption, DOB looks to the legislative intent; and

WHEREAS, DOB asserts that the legislative intent of the ZR is to have side yards and provide access to light and air and that there are few limited exceptions to side yard requirements; and

WHEREAS, DOB cites to the report which preceded the 1961 ZR - Voorhees, Walker, Smith, and Smith, Zoning New York City 54 (1958), which states

> [t]he proposed yard regulations. . . are designed to provide a minimum amount of open space between building wall and lot lines in order to provide a basic supply of light and air to all required windows. In addition, by separating buildings, yards add to the privacy of occupants of a given lot as well as adjacent lots; and

WHEREAS, in its letter, DCP agrees that DOB's interpretation is "consistent with the objectives of side yard zoning requirements, which are intended to ensure sufficient light and air to new developments and to adjacent properties"; and

WHEREAS, DOB agrees that the plain language of the ZR does not prohibit approval of the Subject Building; and

WHEREAS, however, DOB does not agree that, in the absence of specific parameters, the Appellant should follow a broad interpretation of the section as was done here; and

WHEREAS, DOB argues that the result of applying a broad interpretation to the Subject Building leads to a result contrary to the spirit of the ZR; and

WHEREAS, DOB notes that although the ZR does not specify that the existing wall measure a certain depth, a rational interpretation of the statute requires DOB to apply a minimum dimension to ensure that the waiver provides relief only where a substantial amount of the existing building is located on the lot line and where the new building is designed to share a substantial portion of the existing wall, thereby preventing misuse of the waiver where just a small portion of the walls are on the lot line; and

WHEREAS, the Board agrees with DOB and finds that the Appellant's interpretation of ZR § 23-49 is unconvincing, inconsistent, and fundamentally contrary to legislative intent; and

WHEREAS, further, as noted above, the Board notes that, at the first hearing, the Appellant conceded that although no specific guidelines are set forth in ZR § 23-49, there are reasonable limits to the applicability of the exception; and

WHEREAS, the Board has determined that there is substantial evidence to reflect that certain lower density zoning districts require side yards except in very limited situations; and

WHEREAS, the Board notes that the ZR generally permits three exceptions to the side yard requirement in certain low density residential zoning districts; these exceptions are: (1) reduced side yards for narrow lots; (2) modified rules for lot subdivisions; and (3) waivers when there are adjacent existing buildings along the lot line with

no side yards, pursuant to ZR § 23-49; and

WHEREAS, accordingly, the Board concludes that a broad interpretation of ZR § 23-49 is not consonant with the text of the ZR and cannot be supported; and

The Interpretation of the 1986 Memo

WHEREAS, because the statute does not provide a clear guideline, DOB, and ultimately the Appellant, have turned to the 1986 Memo to try to help identify and quantify which walls would be eligible for the side yard waiver under ZR § 23-49; and

WHEREAS, the Board notes that in its initial submission, the Appellant contended that DOB had no authority to draft the Memo and that it was not required to explain the text, as will be discussed in more detail below; and

WHEREAS, however, at the first hearing, the Appellant modified his argument to state that the Subject Building complies with the Berger Interpretation; and

WHEREAS, the Berger Interpretation, as articulated at hearing by the memo's drafter, is that the phrase "depth of the building" in the memo refers to the depth of only the portion of the existing adjacent building on the lot line; and

WHEREAS, the DOB's Proffered Interpretation is that "depth of the building" refers to the full depth of the existing adjacent building; and

WHEREAS, accordingly, the Appellant asserts that since there is no definition of the phrase "depth of the building" in the 1986 Memo and the drafter represents that the relevant interpretation of the phrase is that the depth refers only to the measurement of the portion of the adjacent wall on the lot line; and

WHEREAS, the Appellant claims that his interpretation is the common interpretation applied to the 1986 Memo from 1986 to 2005 (or even later) based on the testimony of the drafter and assumptions about DOB practice; and

WHEREAS, accordingly, the Appellant notes that, although 50 percent of the Existing Building's total depth is not along the shared lot line, 50 percent of the depth of the Existing Building's lot line wall is overlapped by the Subject Building's lot line wall; and

WHEREAS, specifically, the Appellant claims that the adjacent existing wall is built to the lot line for a depth of 30 feet, and 20 feet (67 percent) of it is overlapped by the lot line wall of the Subject Building; and

WHEREAS, as noted above, the Board questions whether the Appellant's calculation is accurate, given that the required front yard is 18 feet and the Existing Building is built to its front lot line, leaving only 12 feet (40 percent) of the Subject Building, which could potentially overlap with the Existing Building since any permitted obstruction in the Subject Building's front yard could not contribute to the purportedly required side wall overlap (any wall or other obstruction within the required front yard would be subtracted from the calculation); and

WHEREAS, compliance with the Berger Interpretation would require an overlap of at least 15 feet (50 percent), or potentially three feet more than what the Subject Building provides; and

WHEREAS, additionally, photographs the Appellant submitted into the record on October 9, 2007 reflect that the portions of the Subject Building's side wall as indicated on Appellant's submitted plans appear to not have been built; and

WHEREAS, the Board notes that it is unclear whether the drawings illustrating the overlap meet the Appellant's interpretation of the 1986 Memo or whether the built conditions reflect the drawings associated with the permits; and

WHEREAS, DOB understands "depth of the building" to have the customary meaning which is the measure of the distance between the front of the building and the back of the building; and

WHEREAS, the Board agrees with DOB's interpretation that "depth of the building" means the distance from the front of the building to the rear of the building, notwithstanding any portion of the building which is located on the side lot line; and

- DOB's History of Interpretation

WHEREAS, George Berger, who was then the Assistant Commissioner of Building Construction and Special Projects at DOB, drafted the 1986 Memo with the subject heading "Special Provision for Party or Side Lot Line Walls § 23-49 ZR" to help clarify the ambiguity in the statute and provide guidelines for when it should apply; and

WHEREAS, the Appellant contends that from the time of the distribution of the memo on September 2, 1986 until approximately the time of the issuance of the Denial, DOB followed the interpretation that "50% of the depth of the building" meant 50 percent of the depth of the existing adjacent lot line wall; and

WHEREAS, Mr. Berger provided testimony stating that this had been DOB's interpretation; and

WHEREAS, DOB denies that this interpretation was followed in the approval of the Subject Building; and

WHEREAS, on April 28, 2005, a DOB Borough Commissioners Technical Meeting ("BCTM") addressed the provisions of ZR § 23-49 and determined that "where the party or side lot line wall of the existing building is less than 50% of the total depth of the existing building, ZR § 23-49 . . . cannot be applied and the side yard requirement cannot be waived per ZR § 23-49"; and

WHEREAS, DOB did not have a record reflecting that these notes had been distributed, but, during the hearing process provided evidence that they were distributed to borough commissioners and other DOB staff on July 9, 2007; and

WHEREAS, additionally, DOB states that the Bronx Borough Commissioner disseminated the information to Bronx plan examiners after the 2005 BCTM; and

WHEREAS, the Appellant questioned the timing of the recordation of these notes, but the Board accepts them as an accurate reflection of the determination at the 2005 BCTM; and

WHEREAS, the Board notes that the August 22, 2005 Denial refers to the BCTM, notes that this matter was also

discussed with Technical Affairs, and, as noted, reflects the interpretation that "depth of building" means total depth of the existing building, not just the depth of the wall on the lot line; and

WHEREAS, DOB represents that the Proffered Interpretation has been in place since at least April 28, 2005 when the 1986 Memo was discussed at the BCTM; and

- DOB's Authority to Issue Memos

WHEREAS, as noted, before the Appellant articulated his support for the Memo, he initially questioned DOB's authority to issue memos; and

WHEREAS, although the Appellant now espouses the Berger Interpretation, in the first submission to the Board, the Appellant disagreed with the Memo, as interpreted in the Denial, and found the Memo was unnecessary and an abuse of DOB's authority; and

WHEREAS, the Appellant asserted that DOB does not have the authority to draft memos because memos, explicating the ZR are de facto amendments to the ZR and that DOB's application of the Memo is arbitrary and capricious; and

WHEREAS, but, the Appellant now asserts that if DOB does have the authority to issue memos to clarify the text, it should rely on the interpretation of the 1986 Memo articulated by the Appellant; and

WHEREAS, DOB asserts that memo-drafting is a reasonable and established exercise of DOB's authority to enforce zoning regulations; and

WHEREAS, in response to the Board's question about the history and function of memo-drafting at DOB, DOB responded that memos precede the current PPN's and were issued and bound to aid DOB and practitioners; and

WHEREAS, DOB provided evidence that the 1986 Memo was issued and bound in a volume which was distributed at DOB and offered for sale to practitioners; and

WHEREAS, the Board agrees that DOB has the authority to interpret the ZR and the issuance of memos and PPNs are within its authority to memorialize clarification of specific issues; and

WHEREAS, DOB provided other examples of where it has adopted quantitative standards in order to clarify the ZR; these include a maximum floor area figure for accessory automotive uses and a definition of "substantial" when measuring the proportion of adult content material to other material in a particular establishment; and

WHEREAS, the Board concurs that sometimes it is necessary for DOB to clarify ambiguous terms in the ZR and to establish measurements which are not clearly stated within the text; and

- BCTM Discussion of the 1986 Memo

WHEREAS, the Appellant contends that DOB changed its interpretation of the Memo to the interpretation articulated in the Denial (the Proffered Interpretation) after the permit for the Subject Building had been issued; and

WHEREAS, accordingly, the Appellant asserts that DOB is arbitrary to formulate the Proffered Interpretation and objects to a purported change in interpretation post-permitting for the Subject Building; and

WHEREAS, at hearing, DOB responded that it could not ascertain what interpretation of ZR § 23-49 or the 1986 Memo, if any, had been applied at the time the permits were approved, and asserts that the permits were issued mistakenly; and

WHEREAS, however DOB asserts that even if the permits for the Subject Building or for other buildings, were issued under an alternate interpretation of ZR § 23-49 or the 1986 Memo, alternate interpretations are inconsistent with the ZR and are not enforceable; and

WHEREAS, DOB disagrees with the Appellant that it was arbitrary or improper to formally adopt the Proffered Interpretation at the 2005 BCTM; and

WHEREAS, to support this point, DOB cites to Charles Field Delivery v. Roberts, 66 N.Y.2d 516 (N.Y. 1985); in Charles Field, the court states that agencies are permitted to correct mistakes as long as such changes are rational and are explained; and

WHEREAS, DOB contends that its interpretation of the 1986 Memo is rational and reflects the legislative intent which is that only when a substantial or significant portion of the existing adjacent building is at the lot line should the issue of compensating an adjacent property owner, through a side yard exemption, for the impact on the new development of his property be permitted; and

WHEREAS, the Board agrees that DOB's interpretation is the rational construction of the 1986 Memo that reinforces the legislative intent of the ZR by establishing a reasonable amount of the existing adjacent building which must be located on the lot line in order to trigger the exception and exempt the side yard requirement altogether; and

WHEREAS, the Board agrees that Charles Field supports DOB's assertion that it can refine its statutory interpretation and that "administrative agencies are free, like courts, to correct a prior erroneous interpretation of the law," 66 N.Y.2d at 519; and

WHEREAS, further, the Board agrees that DOB's Proffered Interpretation balances the interests of two property owners by ensuring that the requirement of a side yard is reduced (or eliminated) only in rare instances where an adjacent building does not provide its required side yard and the existing condition does not contribute to the open space to be enjoyed by both properties; and

- DOB Practice

WHEREAS, the Appellant has identified two other examples, approved by DOB, where side yards were not provided by a new building which shares a lot line with another building (existing or new) with a lot line wall condition; and

WHEREAS, the first example is Prentiss Avenue, which the Appellant represents was approved after an audit by DOB; it has a new lot line wall contiguous with another new lot line wall for 100 percent of the shallower building's total depth; and

WHEREAS, the Board notes that since both buildings in the Prentiss Avenue example are proposed new construction, an argument could be made that since the

deeper building matches 100 percent of the depth of the shallower building it therefore complies with DOB's Proffered Interpretation; additionally, it appears as though these two buildings occupy what was formerly a single shared zoning lot as is not the case with the Existing Building and the Subject Building; and

WHEREAS, the second example is Utopia Parkway, which also does not appear to be analogous because the existing building there is actually two attached two-family buildings and the new building on the adjacent lot does overlap more than 50 percent of the depth of the front building; and

WHEREAS, as noted, DOB distinguishes these examples and states that while it cannot determine which interpretation of the side yard exception was applied, it appears to be neither the Proffered Interpretation nor the Berger Interpretation of the 1986 Memo; and

WHEREAS, the Board agrees with DOB that the Appellant's examples are unpersuasive since neither is analogous and one or both may actually comply with DOB's Proffered Interpretation; and

WHEREAS, further, the Board notes that even if the two examples, which were executed by the same architect as the Subject Building, were approved under an interpretation other than the Proffered Interpretation, DOB may correct its interpretation, pursuant to Charles Field, because it was flawed; and

WHEREAS, additionally, the Board notes that the Appellant failed to provide any evidence, other than Mr. Berger's testimony, to support its claim that the Berger Interpretation was the established practice at DOB from 1986 to 2005; and

STATUTORY INTERPRETATION PRINCIPLES

WHEREAS, as to statutory interpretation, the Appellant makes the following assertions: (1) that any ambiguity in the text should be resolved in favor of the property owner and (2) that DOB was arbitrary in its application of the Proffered Interpretation; and

WHEREAS, as to the first point, the Appellant cites to case law including Sposato v. Zoning Board of Appeals, 287 A.D.2d 639, 639 (2d Dept. 2001) and Hogg v. Cianciulli 247 A.D.2d 474, 474-475 (2d Dept. 1998) to support its position that if a statute is ambiguous, it is to be construed against the administrative agency charged with upholding it; and

WHEREAS, however, DOB notes that the Appellant does not address the countervailing legal principle that "BSA and DOB are responsible for administering and enforcing the zoning resolution (New York City Charter §§ 643 and 666[7]), and their interpretation is neither irrational, unreasonable nor inconsistent with the governing statute," Appelbaum v. Deutsch, 66 N.Y.2d 975, 977 (N.Y. 1985); and

WHEREAS, further, DOB cites to Appelbaum for the point that administrative agencies may turn to the stated purpose of the statute as a whole in interpreting specific provisions; and

WHEREAS, DOB also cites to People v. Ryan, 274 N.Y.149 (N.Y. 1937) for the principle that narrowing the application of a statutory term is permitted to avoid a result contrary to legislative intent, and to Lee v. Chin, 781 N.Y.S.2d 625 (N.Y. Sup. Ct. 2003) for the principle that New York courts view the ZR as a whole and harmonize the parts to achieve the legislative purpose is a well-established rule of statutory construction; and

WHEREAS, the Board agrees with DOB that the Appellant's citation to a general principle of statutory interpretation does not outweigh the established body of case law which permits administrative agencies to resolve ambiguity and narrow interpretations in light of a clear legislative intent; and

WHEREAS, specifically, the Board notes that the court applied this principle to the interpretation of the ZR in Lee v. Chin, a case in which the court upheld the Board's interpretation of a provision of the ZR related to building height, and stated that "it cannot be said that BSA violated the well-established rule of statutory construction that a statute be viewed as a whole, and all of its parts, if possible, be harmonized to achieve the legislative purpose" 781 N.Y.S.2d 625 at 16 (1st Dept. 2003); and

WHEREAS, accordingly, the Board agrees with DOB and DCP that ZR § 23-49, when read in the context of the ZR as a whole, requires a more narrow interpretation of the lot line wall conditions and resultant side yard exemptions than the Appellant proposes; and

WHEREAS, as to the second point, the Appellant cites to Friend v. Feriola, 35 Misc. 2d 250 (N.Y. Sup. Ct. 1962); in Friend, where the court held that a proffered interpretation of zoning was strained and that "the Board of Appeals is not vested with despotic and arbitrary powers; it must act intelligently and fairly and within the domain of reason"; and

WHEREAS, DOB disagrees that it has acted arbitrarily and finds that Friend actually supports a more narrow interpretation since the Proffered Interpretation, when read in the context of the ZR, helps eliminate the potential for absurd or unintended results contrary to legislative intent that might otherwise occur under the plain meaning of ZR § 23-49 or under the Berger Interpretation; and

WHEREAS, as to DOB's application of the Proffered Interpretation, the Board notes that the Appellant failed to establish a consistent DOB interpretation in practice that was arbitrarily abandoned at the time the Subject Building's plans were ultimately audited and rejected; and that the two examples discussed above are distinguishable; and

WHEREAS, the Board agrees that DOB has not been arbitrary and concludes that the courts have given great weight to the principle that a particular provision be illuminated by the text as a whole; and

VESTED RIGHTS CLAIM

- The Validity of the Permits

WHEREAS, the Appellant argues that DOB instituted a change in policy and interpretation subsequent to the issuance of the relevant permits and that this is tantamount to a change in the zoning; the appellant asserts the right to vest under a prior interpretation; and

WHEREAS, the Appellant cites to the canon of

vesting case law to support its assertion; and

WHEREAS, specifically, the Appellant asserts that if the Board upholds the Proffered Interpretation and denies the appeal, then the Board should grant a vested right to complete construction and obtain a certificate of occupancy; and

WHEREAS, the Appellant relies on the following arguments: (1) the permits were valid because the proposal complies with DOB's interpretation at the time of issuance (the Berger Interpretation), and (2) the Appellant relied on the permits in good faith as it completed the majority of construction on the Subject Building; and

WHEREAS, as to the validity of the permits, the Appellant asserts that the permits were valid because they were issued pursuant to DOB's interpretation of the relevant zoning at the time of issuance; and

WHEREAS, the Appellant cites to Friend to support the assertion that it should be permitted to complete construction on the Subject Building because of a good faith reliance on the permit; and

WHEREAS, as discussed above, DOB contends that permits were not ever valid because they were mistakenly issued and cannot be relied on regardless of how much construction had been completed at the time of revocation; and

WHEREAS, DOB distinguishes the subject case from Friend, because (1) intervening case law has held that vested rights cannot be established for the reliance on a permit issued in violation of zoning, (2) unlike in Friend, there is clear evidence that the proposal is in violation of the relevant zoning provision, (3) unlike in Friend, the DOB's interpretation of zoning is not strained, but is supported by the text of the ZR, (4) while the Friend court found the violation of zoning to be minimal, the insufficient depth of the existing wall here is significant, and (5) while the walls at issue in Friend were necessary to prevent soil erosion and block falls, there is no safety issue here; and

WHEREAS, as discussed above, DOB disagrees that the permits were valid whether they were mistakenly accepted after being rejected for failure to comply with ZR § 24-39, or as the Appellant contends, they were accepted after DOB's plan examiner applied the alternate interpretation of the 1986 Memo; and

WHEREAS, DOB asserts that a permit issued based on a plan examiner's incorrect interpretation of ZR § 24-39 is invalid just as a permit issued based on any interpretation of ZR § 24-39 or the 1986 Memo that differs from DOB's Proffered Interpretation would be; and

WHEREAS, DOB maintains that a threshold issue in a vested rights case is that construction proceeded pursuant to valid permits; and

WHEREAS, DOB cites to Asharoken v. Pitassy, 119 A.D.2d 404 (N.Y. App. Div. 1986) where the court stated "[b]asic to traditional vested rights jurisprudence is the tenet that there is no right to reliance upon an invalid building permit"; and

WHEREAS, DOB asserts that the permits were not valid because they do not comply with ZR § 23-49; and

WHEREAS, accordingly, because the permits were not valid, DOB rejects the Appellant's vesting claim; and

WHEREAS, the Board agrees with DOB and concurs that New York State courts have consistently held that vested rights may only be granted for work performed pursuant to valid permits; and

WHEREAS, the Board concludes that because the permits were mistakenly issued, they were not valid, and a vested rights argument is flawed; and

- Constructive Notice

WHEREAS, as to constructive notice that the permit was invalid, DOB notes that New York State courts have held that whether or not a permit holder had constructive notice or could reasonably have determined the invalidity of a permit through due diligence is irrelevant to the determination of a permit's validity for vested rights purposes; and

WHEREAS, specifically, DOB cites to Asharoken where the court rejected a vested rights argument stemming from the revocation of permits mistakenly issued to a riding academy in violation of zoning because the academy was subsequently interpreted not to be a permitted "private school"; and

WHEREAS, DOB notes that the court agreed with a restrictive zoning interpretation only after a careful analysis of the legislative intent behind the zoning ordinance; and

WHEREAS, the Asharoken court stated that building permits "are invalid to the extent that they are in derogation of [zoning] . . .In essence, a permit issued for an invalid use is necessarily invalid"; and

WHEREAS, as to constructive notice, the Board agrees with DOB and adds that (1) side yards are required as a rule, and (2) the Appellant knew that DOB objected to the side yard condition during the review process; and

WHEREAS, further, the Board asserts that the relevant exceptions set forth in ZR § 23-49 are not intended to provide a new building with a benefit out of proportion with any detriment resulting from the adjacent building's existing lot line wall condition; and

WHEREAS, the Board distinguishes Village Green v. Nardecchia, 85 A.D.2d 692 (2d Dept. 1981), which was cited by the Appellant, in that it states that the grant of a permit is not an automatic estoppel against denial of a certificate of occupancy and this actually supports DOB's position; and

WHEREAS, the Board further distinguishes Village Green, because the facts of that case were that the DOB examiner's interpretation was rational, but in the instant appeal it is not clear what interpretation the examiner followed, but, as noted, the approval did not reflect the intent of the ZR; and

WHEREAS, further, the Board notes that, in Village Green, the issuance of permits was preceded by meetings and hearings on the non-compliance, which did not happen in the subject case where the Appellant relied on an approval from a single DOB examiner subsequent to an objection for side yards, also at the examiner level; and

WHEREAS, the Board does not accept the Appellant's

argument that since the permits were approved by a DOB examiner after plan review, that they are valid; and

WHEREAS, in fact, the Board notes that the applicant conceded that DOB issued an objection to the side yard, but the architect somehow cured it; the Appellant did not provide any record of how it was corrected; and

EQUITABLE RELIEF CLAIM

WHEREAS, the Appellant claims that he relied in good faith on validly issued permits and completed approximately 90 percent of construction on the Subject Building by the time DOB issued a stop work order and issued the Denial; and

WHEREAS, the Board agrees with DOB that the permit was invalid and as such the Appellant's vested rights claim fails, regardless of how much work was completed; and

WHEREAS, further, the Board states that it does not have authority to weigh equity concerns; and

WHEREAS, instead, the Board states that it has analyzed the appeal based on a statutory interpretation of ZR § 23-49, which is the subject of the Denial; and

WHEREAS, accordingly, because the permits were invalid, pursuant to the Proffered Interpretation, the Board concludes that the degree of completion of the Subject Building is irrelevant; and

CONCLUSION

WHEREAS, the Board has considered all of the arguments made by Appellant and DOB in light of the entire record; and

WHEREAS, based on DOB's Proffered Interpretation, the Board has determined that the Subject Building does not comply with ZR § 23-49, as interpreted by DOB; and

WHEREAS, specifically, the Board concludes that because less than 50 percent of the total depth of the Existing Building is located on the shared lot line, the Subject Building must provide a side yard with a width of at least 8 feet at the northern lot line; and

WHEREAS, accordingly, the Board agrees with DOB's denial of the reconsideration; and

WHEREAS, additionally, the Board does not find that the Appellant has offered a convincing rationale to permit the Subject Building to vest pursuant to its interpretation of the ZR and the 1986 Memo; and

WHEREAS, the Board notes that its decision is limited to the questions raised in this appeal and it has not made a determination as to whether the Subject Building, as built, complies with any alternate interpretation of ZR § 23-49 or the 1986 Memo; and

WHEREAS, the Board notes that the Appellant may request other relief from the Board, pursuant to ZR § 72-01(b) and other applicable provisions of Article VII, Chapter 2 of the ZR, which define the procedures and standards pursuant to which the Board can vary the ZR.

Therefore it is Resolved that the instant appeal, seeking a reversal of the Denial of the Bronx Borough Office of the Department of Buildings, dated August 22, 2005, is hereby denied.

Adopted by the Board of Standards and Appeals, October 16, 2007.

156-07-A

APPLICANT – Jorge F. Canepa, for Victor Battaglia, owner.

SUBJECT – Application June 11, 2007 – Proposed construction a swimming pool and equipment room, located within the bed of a mapped street, contrary to General City Law Section 35. R5 zoning district.

PREMISES AFFECTED – 60 Chipperfield Court, 433.95' south of the corner between Chipperfield Court and Ocean Terrace, Block 687, Lot 337, Borough of Staten Island.

COMMUNITY BOARD #2SI

APPEARANCES – None.

ACTION OF THE BOARD – Appeal granted.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION:

WHEREAS, the decision of the Staten Island Borough Commissioner, dated June 1, 2007, acting on Department of Buildings Application No. 500902491, reads in pertinent part:

"Objection #1 – Proposed swimming pool in the bed of mapped street is contrary to General City Law"; and

WHEREAS, this application requests permission to build a proposed in-ground swimming pool and equipment room within the bed of a mapped street (Tiber Place); and

WHEREAS, a public hearing was held on this application on October 2, 2007 after due notice by publication in the *City Record*, and then to decision on October 16, 2007; and

WHEREAS, by letter dated July 31, 2007, the Department of Transportation (DOT) states that it has reviewed the application and has no objections; and

WHEREAS, the Board notes that DOT did not indicate that it intends to include the applicant's property in its ten-year capital plan; and

WHEREAS, by letter dated June 25, 2007, the Fire Department states that it has reviewed the above application and has no objection; and

WHEREAS, by letter dated July 11, 2007, the Department of Environmental Protection (DEP) states that it reviewed the above application and advises the Board that there is an adopted Drainage Plan PRD-1B & 2B, Sheet 4 of 14 calls for a future 10-in. diameter sanitary sewer and a 15-in. diameter storm sewer starting in Tiber Place off of Ocean Terrace; and

WHEREAS, therefore, DEP requires a minimum of 32'-0" Sewer Corridor on Lot 337 in the bed of Tiber Place for the future drainage plan 10-in. diameter sanitary sewer and a 15-in. diameter storm sewer for the purpose of installation, maintenance, and/or reconstruction of these sewers; and

WHEREAS, in response to DEP's request, the applicant

has agreed to provide the 32'-0" wide Sewer Corridor on Lot 337 in the bed of Tiber Place for the future drainage plan; and

WHEREAS, by letter dated October 1, 2007, DEP states that it has reviewed the revised site plan and finds it acceptable; and

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

Therefore it is Resolved that the decision of the Staten Island Borough Commissioner, dated June 1, 2007, acting on Department of Buildings Application No. 500902491, is modified by the power vested in the Board by Section 35 of the General City Law, and that this appeal is granted, limited to the decision noted above; *on condition* that construction shall substantially conform to the drawing filed with the application marked "Received August 31, 2007," "BSA-3"–one (1) sheet; that the proposal shall comply with all applicable zoning district requirements; and that all other applicable laws, rules, and regulations shall be complied with; and *on further condition*:

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

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

THAT a sewer corridor with the width of 32'-0" for DEP access be provided on Lot 337 in the bed of Tiber Place, as reflected on the BSA-approved plans; and

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

Adopted by the Board of Standards and Appeals, October 16, 2007.

147-07-BZY

APPLICANT – Cozen O'Connor Attorneys, for North Seven Associates, LLC, owner.

SUBJECT – Application June 5, 2007 – Extension of time (11-332) to complete construction of a minor development commenced under the prior R6 (M1-2) district regulations. R6B Zoning District.

PREMISES AFFECTED – 144 North 8th Street, south side of North 8th Street, 100' east of Berry Street, Block 2319, Lot 11, Borough of Brooklyn.

COMMUNITY BOARD #1BK

APPEARANCES –

For Applicant: Peter Geis.

For Opposition: Peter Gillespie, Felice Kirby, Paul Leussing, Doris Vila Lidit, Marisa Bowe, Philip Dray, Stephanie Raye, Stephanie Eisenberg and Fergus Grant.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 10 A.M., for continued hearing.

212-07-BZY

APPLICANT – Greenberg Traurig by Deirdre A. Carson, Esq., for 163 Charles St. Realty, LLC, owner.

SUBJECT – Application September 12, 2007 – Extension of time (§11-332) to complete construction of a minor development commenced prior to the amendment of the zoning district regulations on October 11, 2005. R6A, C1-5 zoning district.

PREMISES AFFECTED – 163 Charles Street, fronting on Charles Street and Charles Lane, between Washington and West Streets, Block 637, Lot 42, Borough of Manhattan.

COMMUNITY BOARD #2M

APPEARANCES –

For Applicant: Margo Phlug.

THE VOTE TO CLOSE HEARING –

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

Negative:.....0

ACTION OF THE BOARD – Laid over to October 23, 2007, at 10 A.M., for decision, hearing closed.

Jeffrey Mulligan, Executive Director

Adjourned: A.M.

MINUTES

REGULAR MEETING
TUESDAY AFTERNOON, OCTOBER 16, 2007
1:30 P.M.

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

ZONING CALENDAR

25-06-BZ
CEQR #06-BSA-054K
APPLICANT – Dominick Salvati and Son Architects, for Josef Packman, owner.
SUBJECT – Application February 14, 2006 – Variance (§72-21) to allow an eight (8) story residential building with ground floor community facility use to violate applicable regulations for dwelling unit density (§23-22), street wall height (§23-631 and §24-521), maximum building height (§23-631), front yard (§24-34), side yards (§24-35 and §24-551), FAR (§24-11, §24-162 and §23-141) and lot coverage (§23-141 and §24-11). Project is proposed to include 29 dwelling units and 31 parking spaces. R3-2 district.
PREMISES AFFECTED – 2908 Nostrand Avenue, Block 7690, Lots 79 and 80, Borough of Brooklyn.
COMMUNITY BOARD #15BK
APPEARANCES –
For Applicant: Peter Hirshman
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson....4
Negative:.....0
THE RESOLUTION:

WHEREAS, decision of the Brooklyn Borough Commissioner, dated October 9, 2007, acting on Department of Buildings Application No. 302022460, reads in pertinent part:

"23-22 ZR - Maximum permitted dwelling units is contrary to section noted.

23-631(b) ZR - Maximum permitted wall height and maximum permitted total height is contrary to section noted.

23-45(a) ZR - Minimum required front yard is contrary to section noted.

23-462(a) ZR - Minimum required side yards contrary to section noted.

23-141 ZR - Floor Area Ratio (FAR) and lot coverage are contrary to section noted."; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site within an R3-2 zoning district, a proposed four-story residential building with 15 dwelling units and 15 accessory parking spaces, which exceeds the maximum permitted FAR, lot coverage, wall height, total height, and number of dwelling units and does not provide the minimum required front yard or side yards, contrary to ZR §§ 23-141, 23-462(a), 23-631(b), 23-22, and 23-45(a); and

WHEREAS, a public hearing was held on this application on January 22, 2007, after due notice by publication in the *City Record*, with continued hearings on February 27, 2007, April 17, 2007, July 24, 2007, and September 11, 2007 and then to decision on October 16, 2007; and

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

WHEREAS, Community Board 15, Brooklyn, recommends approval of this application; and

WHEREAS, certain neighbors provided testimony in opposition to the application, citing concerns about access to light and air and parking issues; and

WHEREAS, the subject premises is located on the west side of Nostrand Avenue, between Avenue P and Kings Highway; and

WHEREAS, the site comprises two tax lots – Lots 79 & 80 – and has a total lot width of 80 feet and a total lot area of approximately 8,800 sq. ft.; and

WHEREAS, Lot 80 is occupied with an automobile storage area and Lot 79 is occupied with a one-story automobile repair shop, which will be demolished; and

WHEREAS, the Board notes that in 1940, under BSA Cal. No. 1181-40-A it granted a variance for auto laundry, greasing, and a garage for storage of five trucks; and

WHEREAS, in 1948, under BSA Cal. No. 410-47-BZ, the Board granted an amendment to permit an automotive repair shop, auto laundry, and lubritorium; and

WHEREAS, the applicant initially proposed an eight-story building with a height of 74'-8", a total floor area of 46,649 sq. ft. (5.30 FAR), a residential floor area of 43,824 sq. ft., a community facility floor area of 2,825 sq. ft., 29 residential units, and 31 parking spaces; and

WHEREAS, the applicant provided several interim iterations of the plans along with a financial analysis, which incrementally reduced the floor area and height; these iterations also provided for community facility space below grade; and

WHEREAS, the applicant now proposes a four-story residential building with a streetwall and total height of 36'-0" (the maximum permitted street wall and total height are 21'-0" and 35'-0", respectively); 20,856 sq. ft. of residential floor area (2.37 FAR) (the maximum permitted floor area is 7,040 sq. ft. and 0.6 FAR); a front yard with a depth of 10'-0" (the minimum required front yard is 15'-0"); a lot coverage of 64 percent (the maximum permitted lot coverage is 35 percent); 15 dwelling units (the maximum permitted number of dwelling units is six); no side yards (two side yards with widths of 8'-0" each are required); and 15 parking spaces; and

WHEREAS, the applicant proposes to provide (1) 13 parking spaces in the cellar and two others slightly below grade, (2) three residential units on the lower level, and (3) four residential units on each of the three upper floors; and

WHEREAS, the applicant states that the following are

unique physical conditions which create an unnecessary hardship in developing the site in compliance with applicable zoning district regulations: due to a history of automotive related uses at the site, the soil is contaminated and requires extensive remediation; and

WHEREAS, as to the soil condition, the applicant represents that soil tests reflect that there is contamination by several chemical pollutants as a result of its prior use as an automotive repair shop and vehicle storage facility; and

WHEREAS, the applicant represents that the site has been in constant use for automotive uses since approximately 1930 and until recently; and

WHEREAS, specifically, the soil boring analysis reflects that there are at least eight volatile organic compounds, among other contaminants, present at the site; and

WHEREAS, further, the analysis reflects that the drain, which was used to dispose of paint and auto-body chemical waste, should be removed from the ground and all impacted soils within the zone of contamination (from the ground surface to 22 feet below grade) should be removed and treated and disposed of in accordance with New York State Department of Environmental Conservation approved procedures; and

WHEREAS, the analysis states that these procedures include (1) pumping out all liquids present in the drain using a vacuum truck, (2) removing all contaminated soil with a guzzler truck, (3) removing all fill material present in the subsurface soil in accordance with all relevant regulations, and (4) installing a vapor barrier under the new foundation; and

WHEREAS, the Board notes that the prior approved use of the site for automotive uses pre-dates the enactment of modern environmental standards and regulations; and

WHEREAS, as to the uniqueness of the site conditions, the applicant represent that there are no other available underbuilt or vacant lots within a 200-ft. radius of the site; and

WHEREAS, the applicant has documented more than one million dollars in premium construction costs associated with the remediation of the site; and

WHEREAS, the applicant represents that the waivers are required to accommodate sufficient floor area to overcome the premium construction costs while maintaining a building with a height and yards which are compatible with neighborhood character; and

WHEREAS, the Board finds that the aforementioned unique physical conditions, when considered in the aggregate, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

WHEREAS, initially, the applicant submitted a financial analysis for (1) a seven-story building with environmental remediation, (2) a seven-story building without environmental remediation, (3) an eight-story building with environmental remediation, and (4) an eight-story building without environmental remediation; and

WHEREAS, as noted, throughout the hearing process, the Board directed the applicant to reduce the degree of waivers requested and to reflect the minimum variance; thus, the applicant modified the financial analysis to reflect different scenarios and to respond to the Board's concerns; and

WHEREAS, ultimately, the applicant provided a revised financial analysis which reflects, in addition to the proposed four-story (2.37 FAR) building: (1) an as of right 0.60 FAR scenario if the site were not contaminated, and (2) an as of right 0.60 FAR scenario with the documented environmental remediation; and

WHEREAS, the applicant concluded that none of the as of right scenarios would result in a reasonable return, due to prohibitively high construction costs; and

WHEREAS, thus, the applicant asserts that the additional FAR and height is required to overcome the premium construction costs; and

WHEREAS, based upon its review of the applicant's financial studies, the Board has determined that because of the subject site's unique physical conditions, 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 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 surrounding area is mixed use with one-story commercial buildings, two- and three-story residential buildings, and six- and seven-story apartment buildings; and

WHEREAS, the site to the south of the subject site is occupied by a seven-story multiple dwelling building and the site to the north is occupied by a one-story commercial building; the majority of sites on the block are occupied by two-story residential buildings, but multiple dwelling buildings with comparable heights occupy several block fronts on Kings Highway; and

WHEREAS, the Board notes that the adjacent seven-story building does not provide a setback and that there is not a strong streetwall context on Nostrand Avenue near the site; and

WHEREAS, at the Board's direction, the applicant reduced the height of the building by sinking the lower level into the ground to make the overall height more compatible with the buildings in the vicinity; and

WHEREAS, throughout the application process, the applicant eliminated several floors and made the building more compatible with adjacent development; and

WHEREAS, specifically, the final iteration provides for a height of 36 feet, which is only one foot higher than what would be permitted; and

WHEREAS, the applicant initially proposed to provide parking for four cars in the rear yard; and

WHEREAS, the applicant revised the plans to provide for all of the parking either in the cellar or at the front of the building so as to provide an open space at the rear with a depth of 30'-0" and to be more compatible with adjacent neighbors at the rear of the site; and

WHEREAS, the Board notes that the applicant will provide one parking space for each dwelling unit; and

WHEREAS, the Board notes that the proposed residential use is as of right and more compatible with the residential use in the area than the pre-existing non-conforming use; and

WHEREAS, the Board notes that the applicant initially proposed community facility use on the lower level; and

WHEREAS, at the Board's direction, the applicant eliminated the community facility space which increased the floor area and height; and

WHEREAS, based upon the above, 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 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 rather a function of the unique physical characteristics of the site; and

WHEREAS, as noted, the Board does not regard the contaminated soil conditions to be a self-created hardship since it can be attributed to a legal non-conforming use at the site which pre-dates modern environmental regulations; and

WHEREAS, the Board notes that the applicant initially claimed that additional floor area, height, and dwellings were required to overcome the hardship at the site; and

WHEREAS, the Board agrees that there is practical difficulty due to the unique conditions of the site, which require additional floor area and the other noted waivers, but disagrees that the initially proposed degree of FAR, height and dwelling count waivers initially proposed are needed to make the building feasible; and

WHEREAS, as noted, the applicant revised the application to reduce the degree of floor area and FAR waivers, and to reflect the 2.37 FAR distributed appropriately on the site; and

WHEREAS, the Board notes that the applicant has significantly reduced the number of residential units from the initially proposed 29; and

WHEREAS, the Board notes that the applicant also initially proposed two cellar levels; and

WHEREAS, the applicant represented that the two cellar levels were necessary to accommodate the parking and other uses at the site, yet acknowledged that excavating two levels of earth increased the remediation costs; and

WHEREAS, thus, at hearing, the Board directed the applicant to eliminate the second cellar level in order to reduce the costs associated with the remediation and to minimize the requested waivers; and

WHEREAS, accordingly, the Board finds that the current 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 Part 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., dated May 3, 2006; 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 Office of Environmental Planning and Assessment of the New York City Department of Environmental Protection (DEP) has reviewed the following submissions from the applicant: May, 2006 Environmental Assessment Statement (EAS), June, 2006 Phase I Environmental Site Assessment report (Phase I); and August, 2005 Phase II Environmental Subsurface Investigation report (Phase II).

WHEREAS, these submissions specifically examined the proposed action for potential hazardous materials impacts; and

WHEREAS, a DEP Restrictive Declaration (the "DEP RD") was executed on October 11, 2006 and submitted for proof of recording on November 30, 2006 and requires that hazardous materials concerns be addressed; and

WHEREAS, DEP has determined that there would not be any impacts from the subject proposal, based on the implementation of the measures cited in the DEP RD and the applicant's agreement to the conditions noted below; 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 R3-2 zoning district, a proposed four-story residential building with 15 dwelling units and 15 accessory parking spaces, which exceeds the maximum permitted FAR, lot coverage, wall height, total height, and number of dwelling units and does not proved the minimum required front yard or side yards, contrary to ZR §§ 23-141, 23-462(a), 23-631(b), 23-22, and 23-45(a), *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 October 2, 2007"- seven (7) sheets; and *on further condition*:

THAT the following shall be the bulk parameters of the building: a maximum of four stories including any basement, a maximum of 15 dwelling units, a total height and streetwall height of 36'-0", a floor area of 20,856 sq. ft. (2.37 FAR), a front yard depth of 10'-0", a rear yard depth of 30'-0", a lot coverage of 64 percent, and a minimum of 15 parking spaces, all as illustrated on the BSA-approved plans;

THAT the parking layout shall be as 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; and

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

Adopted by the Board of Standards and Appeals, October 16, 2007.

114-06-BZ

APPLICANT – Sheldon Lobel, P.C., for Aleksandr Levchenko, owner.

SUBJECT – Application June 6, 2006 – Special Permit (§73-622) to allow the legalization of an enlargement to a single family home in an R3-1 zoning district, which exceeds the allowable floor area ratio, open space and lot coverage (§23-141); provides less than the minimum required side yards (§23-48).

PREMISES AFFECTED – 124 Norfolk Street, west side of Norfolk Street between Shore Boulevard and Oriental Boulevard, Block 8756, Lot 10, Borough of Brooklyn.

COMMUNITY BOARD #15BK

APPEARANCES –

For Applicant: Richard Lobel.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION:

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated October 16, 2007, acting on Department of Buildings Application No. 301863605, reads in pertinent part:

"1. Provide minimum side yards as per ZR 23-46
2. FAR exceeds that permitted by ZR 23-141
3. Open space and lot coverage as per ZR 23-141"; and

WHEREAS, this is an application under ZR §§ 73-622 and 73-03, to permit, within an R3-1 zoning district, the partial legalization and modification of an enlargement to a single-family home, which does not comply with the zoning requirements for floor area, lot coverage, and side yards, contrary to ZR §§ 23-141 and 23-461; and

WHEREAS, a public hearing was held on this application on April 10, 2007, after due notice by publication in *The City Record*, with continued hearings on June 12, 2007, July 24, 2007, August 21, 2007 and September 18, 2007, and then to decision on October 16, 2007; and

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

WHEREAS, Community Board 15, Brooklyn, recommends disapproval of this application; and

WHEREAS, the Manhattan Beach Community Group provided testimony in opposition to the application, citing concerns about illegal construction, non-complying perimeter wall and total height, and whether a sufficient portion of the original home had been retained; and

WHEREAS, the subject site is located on the west side of Norfolk Street, between Shore Boulevard and Oriental Boulevard; and

WHEREAS, the subject site has a total lot area of 3,374 sq. ft., and is occupied by a three-story single-family home with a floor area of 3,351.02 sq. ft. (0.99 FAR); and

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

WHEREAS, the Board notes that the owner of the subject premises enlarged the original home (the "Original Home") pursuant to plans which were professionally certified by the project architect and which did not comply with zoning district regulations; and

WHEREAS, the Board notes that after the majority of the construction had been completed, DOB determined that the building was non-complying as to FAR and side yards and revoked the permits on January 20, 2006; and

WHEREAS, the site is currently occupied by a 3,351.02 sq. ft. (0.99 FAR) three-story single-family home (the "Current Home") (1,687.25 sq. ft. and 0.50 FAR are the maximum permitted in the zoning district); and

WHEREAS, prior to the enlargement, the one-story Original Home had pre-existing legal non-complying side yards with widths of 4'-7 ½" and 0'-11"; and

WHEREAS, the Current Home, with the subject enlargement, maintains these side yards and provides complying front and rear yards; and

WHEREAS, the Current Home provides a lot coverage of 39 percent (35 percent is the maximum permitted); and

WHEREAS, during the hearing process, the Board identified additional non-compliance, as described below; and

WHEREAS, the Current Home has a gambrel roof, which does not provide the required minimum pitch or a discernible perimeter wall (a perimeter wall, as defined by

DOB, may have a maximum height of 21 feet); and

WHEREAS, the Current Home has a non-complying total height of 35'-10" (a total height of 35'-0" is the maximum permitted in the zoning district); and

WHEREAS, because of the absence of a sufficient pitch and a discernible perimeter wall, the roof condition results in the penetration of the sky exposure plane at the third floor; and

WHEREAS, additionally, the two dormers at the sides of the roof penetrate the sky exposure plane; and

WHEREAS, the applicant initially proposed to legalize the entire enlargement; and

WHEREAS, however, as noted, the Board determined that portions of the enlargement were beyond the parameters of the special permit; and

WHEREAS, the Board notes that it does not have the authority to waive building height and penetration of the sky exposure plane or, generally, perimeter wall height; and

WHEREAS, at the Board's request, the Department of Buildings investigated the site and confirmed that the Current Home fails to comply with ZR § 23-631(b) in that the roof penetrates the permitted building envelope and additionally that the side dormers are not permitted obstructions as per ZR § 23-621; and

WHEREAS, at the Board's direction, the applicant modified the proposal to legalize the elements of the Current Home, which are within the parameters of the special permit and to comply with zoning district regulations for all others; and

WHEREAS, specifically, the Board directed the applicant to modify the plans to comply with all relevant zoning district regulations not requested to be waived and to re-design the roof/attic level to be more compatible with neighborhood character; and

WHEREAS, in response, the applicant (1) re-designed the pitch of the roof so as to provide a complying perimeter wall with a height of 21'-0" and to not penetrate the sky exposure plane, (2) re-designed the entire attic plan, and (3) reduced the dormers so as to not penetrate the sky exposure plane; and

WHEREAS, at hearing, the also Board raised concerns about whether the construction could be documented as an enlargement or whether it was truly new construction; and

WHEREAS, the Board asked the applicant to provide the following in support of the assertion that the construction constitutes an enlargement: (1) a building survey pre-dating the construction of the Current Home and (2) the original plans for the Current Home, reflecting the portions of the foundation and first floor walls that were to be retained; and

WHEREAS, in response, the applicant provided a survey from 2003, that showed the location of the side walls of the Original Home; and

WHEREAS, specifically, the existing side walls match the location of the walls of the Original Home in 2003; and

WHEREAS, secondly, the applicant provided the original drawings approved at DOB on March 29, 2005, through the professional certification process, that reflect an enlargement with the retention of portions of the foundation and the first floor walls; and

WHEREAS, the Board notes that the drawings initially submitted with the current proposal are the same as the previous drawings approved at DOB and there are not any inconsistencies; and

WHEREAS, further, the Board notes that there were no stop work orders issued that related to the demolition of existing walls or any non-adherence to demolition plans; and

WHEREAS, the Board notes that the Manhattan Beach Community Group contends that the current building is the result of either a tear down and new construction or a new building being built around the Original Home; and

WHEREAS, the Board notes that no evidence has been submitted into the record to substantiate these claims; and

WHEREAS, accordingly, because the applicant provided the following evidence: (1) a survey establishing that the location of the original walls and the current walls is the same, (2) original and proposed building plans which are consistent with each other, and (3) no record of stop work orders related to demolition or not building according to approved plans, the Board is satisfied that the proposed (and existing) construction reflects an enlargement; and

WHEREAS, the Board notes that it may only legalize portions of the construction which either comply with zoning district regulations or are within the parameters of the waivers permitted under the special permit; and

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

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

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

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

Therefore it is Resolved, that the Board of Standards and Appeals issues a Type II determination under 6 N.Y.C.R.R. Part 617.5 and 617.3 and §§ 5-02(a), 5-02(b)(2) and 6-15 of the Rules of Procedure for City Environmental Quality Review and makes the required findings under ZR §§ 73-622 and 73-03, to permit, within an R3-1 zoning district, the partial legalization and modification of an enlargement to a single-family home, which does not comply with the zoning requirements for floor area, lot coverage, 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 September

7, 2007"–(1) sheet and "October 3, 2007"-(6) sheets; and *on further condition*:

THAT there shall be no habitable room in the cellar;

THAT the floor area of the attic shall be limited to 950.11 sq. ft.;

THAT the above conditions shall be set forth in the certificate of occupancy;

THAT the following shall be the bulk parameters of the building: a total floor area of 3,351.02 sq. ft. (0.99 FAR), a perimeter wall height of 21'-0", a total height of 35'-0", a front yard of 24'-0", side yards of 4'-7 ½" and 0'-11", and a rear yard of 40.33 feet, as illustrated on the BSA-approved plans;

THAT construction shall be completed by July 16, 2008;

THAT a certificate of occupancy be obtained by October 16, 2008;

THAT the use and layout of the cellar shall be as approved by DOB;

THAT DOB shall review and approve the plans, for compliance with all Building Code and ZR provisions, prior to the issuance of any building permit;

THAT DOB shall review the plans, and the building completed pursuant to these plans, for compliance with total height, perimeter wall height, sky exposure plane, and setback regulations, as per the BSA-approved plan sheet marked "Received September 7, 2007"– Drawing A-15–(1) sheet;

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

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; 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, October 16, 2007.

297-06-BZ & 298-06-A

APPLICANT – Glen V. Cutrona, AIA, for John Massamillo, owner.

SUBJECT – Application November 13, 2006 – Variance under (§72-21) to allow a proposed four (4) story residential building with ground and cellar level retail use to violate applicable lot coverage (§23-145) and rear yard requirements (§23-47). C4-2 district (Special Hillside Preservation District); building is located within the bed of a mapped street, contrary to GCL § 35.

PREMISES AFFECTED – 130 Montgomery Avenue, between Victory Boulevard and Fort Place, Block 17, Lot 116, Borough of Staten Island.

COMMUNITY BOARD #1SI

APPEARANCES –

For Applicant: Glen V. Cutrona.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION:

WHEREAS, the decision of the Staten Island Borough Commissioner, dated November 6, 2006, acting on Department of Buildings Application No. 500855452, reads, in pertinent part:

> "Construction is proposed in the bed of a final mapped street contrary to Article III Section 35 of the General City Law. In addition, variance has been sought from Zoning Resolution Section 23-47 (minimum required rear yards) and 23-145 (for residential buildings developed or enlarged pursuant to the quality housing program;" and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site located partially within a C4-2 (R6 equivalent) Zoning District and partially within an R5 Zoning District within the Special Hillside Preservation District, a mixed-use four-story commercial and residential building with four dwelling units and a full cellar which does not comply with the requirements concerning minimum rear yard and lot coverage, contrary to ZR §§ 23-47 and 23-145, and

WHEREAS, a separate application was filed under BSA Cal. No. 298-06-A to permit construction within the bed of a mapped street and the issue is addressed within a separate resolution; and

WHEREAS, the split lot provision of ZR § 77-11 allows for C4-2 development or an R6 residential equivalent to apply to the entire site; and

WHEREAS, a public hearing was held on this application on September 18, 2007, after due notice by publication in the *City Record*, and then to decision on October 16, 2007; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by Commissioner Ottley-

Brown; and

WHEREAS, Community Board 1, Staten Island, recommends approval of the application, conditioned on LEED certification and a limitation of rear yard access to tenants; and

WHEREAS, the subject premises is located on the west side of Montgomery Avenue, between Fort Place and Victory Boulevard; and

WHEREAS, the lot is an irregular F-shaped site, with 22'-6" of frontage on Montgomery Avenue, a width ranging from between 23'-0" and 40'-0" and a depth of approximately 77'-0"; and a total lot area of 2,386 sq. ft.; and

WHEREAS, the site is currently vacant; and

WHEREAS, because of the size of the block and the fact that more than 50 percent of the zoning lots therein are developed with buildings, the site is within an area which can be defined as predominantly built-up, per ZR § 12-10 ("Predominantly built-up area"); and

WHEREAS, the applicant proposes to construct a mixed use four-story building with full cellar with a total floor area of approximately 6,838 sq. ft. (8,051 sq. ft. is the maximum permitted) comprised of approximately 5,137 sq. ft. of residential space and 1,701 sq. ft. of commercial space, a total FAR of 2.82 (an FAR of 3.4 is permitted), a lot coverage of 69 percent (60 percent is the maximum permitted), and an open space ratio of 31 percent (40 percent is the minimum required), and without the required rear yard for the residential units along the entire rear lot line; and

WHEREAS, the applicant notes that the following are unique physical conditions, which create an unnecessary hardship in developing the site in compliance with applicable regulations: (1) the irregular shape of the lot; (2) fragmentation of the rear lot line; and (3) the uneven, shallow depth of the lot; and

WHEREAS, as to the irregular shape, the applicant states that the lot has a sawtooth shape with many angles; and

WHEREAS, as to the uniqueness of the shape of the lot, the applicant submitted a 400-ft. radius diagram, which reflects that there are is no other lot in the area with as many lot lines; and

WHEREAS, the Board reviewed the submitted diagram and agrees that the subject lot is the only one within the radius with such an irregular shape; and

WHEREAS, the applicant asserts that the lot shape results in inefficient floor plates for residential use, and a corresponding decrease in the value of the units; and

WHEREAS, as to the fragmentation of the rear lot line, the lot line is divided into segments of 23'-0, 5'-8", and 11'-4" in length, with consequently varying depths to the property; and

WHEREAS, the 23'-0" rear lot line is approximately 77'-2' deep, while the 5'-8", and 11'-4" lines are approximately 52'-11" and 43'-0" deep, respectively; and

WHEREAS, the applicant asserts that the combination of the fragmented rear yard and its uneven, shallow depth create a hardship in complying with rear yard requirements of 30 feet for residential units; and

WHEREAS, the applicant also represents that the fragmented rear yard and its uneven, shallow depth result in inefficient floor and restricts the usage of allowable floor area in an efficient manner on the site, thereby creating less marketable units; and

WHEREAS, the applicant represents that the rear yard waiver along the 5'-8" and 47'-2" length rear lot lines would allow the property to utilize its as of right floor area and provide a more efficient floor plate thereby creating units that are marketable given the constraints of the site; and

WHERREAS, such a waiver would result in higher lot coverage; and

WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate, create 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 the following scenarios: (1) two as of right four-story mixed-use buildings with total gross living area of 5,463 sq. ft., (2) an alternate four-story mixed use building with gross living area of 5,463 sq. ft. and (3) the proposed four story mixed use building with approximately 5,137 sq. ft. of residential space and 1,701 sq. ft. of commercial space, for a total of 6,398 sq. ft. of total floor area; and

WHEREAS, the applicant asserts that the two as of right scenarios would not provide a sufficient rate of return; 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, 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 surrounding area is comprised primarily of mixed use commercial/residential and residential buildings; and

WHEREAS, the applicant notes that the lot coverage of the residential portion of the building will be increased by only 9 percent over the 60 percent requirement; and

WHEREAS, additionally, the Board notes that Lots 118 and 112 abutting the north and south of the subject site are vacant and that Lot 126 to the south and Lots 3 and 4 to the west have full rear yards and would not be affected by the proposed development and the rear yard waivers requested along such lot lines; and

WHEREAS, the Board notes that a 30 foot rear yard is provided over a sufficient portion of the lot to provide light and air to the proposed residential units; 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, but that the irregular shape of the lot is the result of the City's street design; and

WHEREAS, specifically, Victory Boulevard intersects Montgomery Avenue at an angle, which has resulted in the irregularly-shaped subject lot; and

WHEREAS, further, the applicant represents that a certification obtained from the Staten island Borough Surveyor indicated that the subject lot has existed in its present configuration since on or before 1917; and

WHEREAS, based on the above, the Board agrees that the hardship herein was not created by the owner; and

WHEREAS, the applicant represents that the proposal is the minimum variance needed to allow for a reasonable and productive use of the site; and

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

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) 08BSA004R dated September 17, 2007; 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 located partially within a C4 Zoning District and partially within an R5 Zoning District within the Special Hillside Preservation District, a mixed-use four-story commercial and residential building with full cellar which does not comply with the requirements concerning minimum rear yard setback and lot coverage, and is contrary to ZR §§ 23-47 and 23-145, *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 November 13, 2006" – eleven (11) sheets and "Received August 8, 2007" – one (1) sheet; and *on further condition*:

THAT the parameters of the development shall be: a total floor area of 6,838 sq. ft., a lot coverage of 69 percent and an open space ratio of 31 percent in conformance with the BSA-approved plans;

THAT the internal floor layouts on each floor of the proposed building shall 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; and

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

Adopted by the Board of Standards and Appeals, October 16, 2007.

329-06-BZ
CEQR #07-BSA-050Q

APPLICANT – Wholistic Healthworks, Inc., for Albino J. Testani, owner.

SUBJECT – Application December 21, 2006 – Special Permit (§73-36) to legalize a PCE in C2-2/R2A/R4 zoning districts. The proposal is contrary to Section 32-00.

PREMISES AFFECTED – 34-34 Bell Boulevard, west of Bell Boulevard, 184.07' from 35th Avenue, Block 6112, Lot 39, Borough of Queens.

COMMUNITY BOARD #11Q

APPEARANCES – None.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION:

WHEREAS, the decision of the Queens Borough Commissioner, dated October 15, 2007, acting on Department of Buildings Application No. 402229487, reads in pertinent part:

> "Proposed physical culture establishment on first floor (message therapy) is not permitted as of right in a C2-2/R4/R2-A district. This is contrary to section 32-10 and must be referred to the BSA for approval"; and

WHEREAS, this is an application under ZR §§ 73-36 and 73-03, to permit, on a site partially within an C2-2 (R4)

zoning district and partially within an R2A zoning district, the legalization of a physical culture establishment (PCE) on the first floor of a three-story mixed-use building, contrary to ZR § 32-00; and

WHEREAS, a public hearing was held on this application on July 17, 2007, after due notice by publication in *The City Record*, with a continued hearing on September 16, 2007, and then to decision on October 16, 2007; and

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

WHEREAS, Community Board 11, Queens, recommends approval of this application; and

WHEREAS, Council Member Tony Avella recommends that the term be limited to two years since this is a legalization of an existing business; and

WHEREAS, the subject site is located on the west side of Bell Boulevard, between 34th Road and 35th Avenue; and

WHEREAS, the PCE occupies the ground floor of a three-story mixed use building with residential use on the second and third floors; the PCE has a floor area of 1,920 sq. ft. and is located entirely within the portion of the site in the C2-2 (R4) zoning district; and

WHEREAS, the PCE is operated as Three Elements Healing Arts Center; and

WHEREAS, the Board notes that the site has been in operation since September 1, 2004; and

WHEREAS, the applicant represents that the services at the PCE include massage treatments and acupuncture; and

WHEREAS, the hours of operation are: Tuesday through Friday, 10:00 a.m. to 8:00 p.m.; Saturday, 11:00 a.m. to 7:00 p.m.; and Sunday and Monday, by appointment; and

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

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

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

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

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

WHEREAS, the project is classified as an Unlisted action pursuant to 6 NYCRR Part 617; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement, CEQR No. 06BSA050Q, dated May 15, 2007; 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, the Board has determined that the operation of the PCE will not have a significant adverse impact on the environment.

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617 and §6-07(b) of the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR §§ 73-36 and 73-03, to permit, on a site partially within an C2-2 (R4) zoning district and partially within an R2A zoning district, the legalization of a physical culture establishment on the first floor of a three-story mixed-use building, contrary to ZR § 32-00; *on condition* that all work shall substantially conform to drawings filed with this application marked "Received June 12, 2007"- two (2) sheets; and *on further condition*:

THAT the term of this grant shall expire on September 1, 2014;

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

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

THAT the hours of operation shall be limited to: Tuesday through Friday, 10:00 a.m. to 8:00 p.m.; Saturday, 11:00 a.m. to 7:00 p.m.; and Sunday and Monday, by appointment;

THAT all signage associated with the PCE shall comply with underlying zoning district regulations and must be properly permitted by DOB;

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

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

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

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

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

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

Adopted by the Board of Standards and Appeals, October 16, 2007.

128-07-BZ

APPLICANT – Law Office of Fredrick A. Becker, for Sharon Perlstein and Sheldon Perlstein, owners.

SUBJECT – Application May 18, 2007 – Special Permit (§73-622) for the enlargement of an existing single family residence. This application seeks to vary open space and floor area (§23-141); less than the minimum side yards (§23-461 and §23-48) and rear yard (§23-47) in an R-2 zoning district.

PREMISES AFFECTED – 1382 East 26th Street, west side of East 26th Street, between Avenue M and Avenue N, Block 7661, Lot 76, Borough of Brooklyn.

COMMUNITY BOARD #14BK

APPEARANCES –

For Applicant: Lyra Altman.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION:

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated June 1, 2007, acting on Department of Buildings Application No. 302345497, reads in pertinent part:

> "The proposed enlargement of the existing two family residence in an R2 zoning district:
>
> 1. Creates non-compliance with respect to the 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 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 and 23-48 of the Zoning Resolution.
> 4. Creates non-compliance with respect to the rear yard by not meeting the minimum requirements of Section 23-47 of the Zoning Resolution."; and

WHEREAS, this is an application under ZR §§ 73-622 and 73-03, to permit, within an R2 zoning district, the proposed enlargement of a single-family home, which does not comply with the zoning requirements for floor area, open space ratio, side yards and rear yard, contrary to ZR §§ 23-141, 23-461, 23-48 and 23-47; and

WHEREAS, a public hearing was held on this application on July 10, 2007, after due notice by publication in *The City Record*, with continued hearings on August 7, 2007 and September 11, 2007, and then to decision on October 16, 2007; and

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

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

WHEREAS, the subject site is located on the west side of East 26th Street, between Avenue M and Avenue N; and

WHEREAS, the subject site has a total lot area of 3,600 sq. ft., and is occupied by a single-family home with a floor area of 2,187 sq. ft. (0.61 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 2,187 sq. ft. (0.61 FAR) to 3,943 sq. ft. (1.10 FAR); the maximum floor area permitted is 1,800 sq. ft. (0.50 FAR); and

WHEREAS, the proposed enlargement will maintain the existing non-complying front yard of 14'-9" (a front yard with a minimum depth of 15'-0" is required), and one existing non-complying side yard of 4'-0" and one complying side yard of 7'-11" (side yards with a minimum width of 5'-0" each are required); and

WHEREAS, the proposed enlargement will provide a 20'-0" rear yard (a minimum rear yard of 30'-0" is required); and

WHEREAS, the enlargement of the building is not located within 20'-0" of the rear lot line; and

WHEREAS, at hearing, the Board asked the applicant to provide information in support of the assertion that the proposed FAR is compatible with neighborhood character; and

WHEREAS, in response the applicant provided an analysis which reflects that 11 percent of homes within a 200-ft. radius of the site have an FAR of 1.10 or greater; and

WHEREAS, further, the applicant notes that within a 200-ft. radius on East 26th Street, the percentage of homes with such an FAR is the same; and

WHEREAS, the Board notes that the homes with FAR of 1.10 or greater are clustered nearby and include one home two lots away; 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, Board finds that the proposed project will not interfere with any pending public improvement project; and

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

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

Therefore it is Resolved, that the Board of Standards and Appeals issues a Type II determination under 6 N.Y.C.R.R. Part 617.5 and 617.3 and §§ 5-02(a), 5-02(b)(2) and 6-15 of the Rules of Procedure for City Environmental Quality Review and makes the required findings under ZR §§ 73-622 and 73-03, to permit, within an R2 zoning district, the proposed enlargement of a single-family home, which does not comply with the zoning requirements for floor area, open space ratio, side yards and rear yard, contrary to ZR §§ 23-141, 23-461, 23-48 and 23-47; *on condition* that all work shall substantially conform to drawings as they apply to the objections above-noted, filed with this application and marked "Received October 2, 2007"–(11) sheets; and *on further condition*:

THAT there shall be no habitable room in the cellar;

THAT the floor area of the attic shall be limited to 833 sq. ft.;

THAT the above conditions shall be set forth in the certificate of occupancy;

THAT the following shall be the bulk parameters of the building: a total floor area of 3,943 sq. ft. (1.10 FAR), a perimeter wall height of 21'-0", total height of 35'-0", a front yard of 14'-9", side yards of 4'-0" and 7'-11", and a rear yard of 20'-0", as illustrated on the BSA-approved plans;

THAT the use and layout of the cellar shall be as 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 objections(s) only; no approval has been given by the Board as to the use and layout of the cellar;

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted; 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, October 16, 2007.

31-06-BZ

APPLICANT – Sheldon Lobel, P.C., for Frank Falanga, owner.

SUBJECT – Application February 24, 2006 – Zoning variance (§72-21) to allow the legalization of an automotive collision repair shop (Use Group 16) in an R3-1/C1-2 district; proposed use is contrary to ZR §§22-00 and 32-00.

PREMISES AFFECTED – 102-10 159th Road, south side of 159th Road near the intersection of 192nd Street and 159th Road, Block 14182, Lot 88, Borough of Queens.

COMMUNITY BOARD #10Q

APPEARANCES –

For Applicant: Josh Rinesmith.

ACTION OF THE BOARD – Laid over to December 11, 2007, at 1:30 P.M., for continued hearing.

311-06-BZ thru 313-06-BZ

APPLICANT – Rothkrug, Rothkrug, & Spector, LLP, for White Star Lines LLC.

SUBJECT – Application December 4, 2006 – Zoning variance under §72-21 to allow three, four (4) story residential buildings containing a total of six (6) dwelling units, contrary to use regulations (§42-10); M1-1 district.

PREMISES AFFECTED – 300/302/304 Columbia Street, Northwest corner of Columbia Street and Woodhull Street, Block 357, Lots 38, 39, 40. Borough of Brooklyn.

COMMUNITY BOARD #6BK

APPEARANCES –

For Applicant: Eric Palatnik.

ACTION OF THE BOARD – Laid over to December 4, 2007, at 1:30 P.M., for deferred decision.

331-06-BZ

APPLICANT – Stadtmauer Bailkin, LLP, for Putnam Holding Corp., owner.

SUBJECT – Application December 27, 2006 – Variance under § 72-21 to allow a three-family dwelling to violate front yard (§23-45) and side yard (§23-462(a)) requirements. R4 district.

PREMISES AFFECTED – 3647 Palmer Avenue, south side of Palmer Avenue, between Needham Avenue and Crawford Avenue, Block 4917, Lot 17, Borough of Bronx.

COMMUNITY BOARD #12BX

APPEARANCES –

For Applicant: Calvin Wong.

ACTION OF THE BOARD – Laid over to November 27, 2007, at 1:30 P.M., for continued hearing.

53-07-BZ

APPLICANT – Wolf Block, Schorr & Solis-Cohen, LLP, for 1901 Realty Realty, LLC, owner.

SUBJECT – Application February 23, 2007 – Variance (§72-21) to permit the redevelopment and conversion of an existing three-story factory/warehouse to residential use. The proposal is contrary to §42-00. M1-1 district.

PREMISES AFFECTED – 1901 Eighth Avenue, corner of Eight Avenue and 19th Street, Block 888, Lot 7, Borough of Brooklyn.

COMMUNITY BOARD #7BK

APPEARANCES –

For Applicant: Paul Padlik.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 1:30 P.M., for deferred decision.

58-07-BZ

APPLICANT – Rex Carner c/o Carner Associates, for Mr. Vito Savino, owner.

SUBJECT – Application March 5, 2007 – Variance (§72-21) to permit a new two-family dwelling on a vacant lot. The Premises is located in an R3A zoning district. The proposal is contrary to lot area (§23-32), residential FAR (§23-141), and parking (§25-21).

PREMISES AFFECTED – 18-02 Clintonville Street, North west corner of 18 Avenue and Clintonville Street. Block 4731, Lot 9, Borough of Queens.

COMMUNITY BOARD # 7Q

APPEARANCES –

For Applicant: Rex Carner.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 1:30 P.M., for continued hearing.

88-07-BZ

APPLICANT – Eric Palatnik, P.C., for Lisa Roz and Ronnie Roz, owners.

SUBJECT – Application April 19, 2007 – Special Permit (§73-622) for the enlargement of a single family residence. This application seeks to vary floor area and lot coverage (§23-141(b)); side yard (§23-461(a)) and rear yard (§23-47) in an R3-2 zoning district.

PREMISES AFFECTED – 1633 East 29th Street, eastern border of 29th Street, south of Avenue P and North of Quentin Road, Block 6792, Lot 62, Borough of Brooklyn.

COMMUNITY BOARD # 15BK

APPEARANCES –

For Applicant: Eric Palatnik.

ACTION OF THE BOARD – Laid over to November 27, 2007, at 1:30 P.M., for continued hearing.

121-07-BZ

APPLICANT – Juan D. Reyes, III, for 400 Victory Boulevard Trust, owner.

SUBJECT – Application May 11, 2007 – Variance (§72-21) to permit the legalization of a Physical Culture Establishment on the first and second floors of an existing nonconforming warehouse building. The proposal is contrary to section 22-00. The Premises is located in an R3-2 zoning district within the Special Hillside Preservation District.

PREMISES AFFECTED – 400 Victory Boulevard, between Austin Place and Cobra Avenue, Block 579, Lot 1, Borough of Staten Island.

COMMUNITY BOARD #1SI

APPEARANCES –

For Applicant: Juan D. Reyers, III, Robert Pauls, John Strauss and Jack Kruger.

ACTION OF THE BOARD – Laid over to December 4, 2007, at 1:30 P.M., for continued hearing.

135-07-BZ

APPLICANT – Lewis E. Garfinkel, R.A., for Ester Loewy, owner.

SUBJECT – Application May 22, 2007 – Special Permit (§73-622) for the enlargement of an existing single family residence. This application seeks to vary floor area and open space (23-141(a)); less than the required side yards (23-461) and less than the required rear yard (23-47) in an R-2 zoning district.

PREMISES AFFECTED – 920 East 24th Street. West side of East 24th Street, 140' north of Avenue L, Block 7587, Lot 54, Borough of Brooklyn.

COMMUNITY BOARD #14BK

APPEARANCES – None.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 1:30 P.M., for continued hearing.

136-07-BZ

APPLICANT – Lewis E. Garfinkel, R.A., for Leora Fenster, owner.

SUBJECT – Application May 22, 2007 – Special Permit (§73-622) for the enlargement of an existing single family residence. This application seeks to vary floor area and open space (§23-141(a)); less than the required side yards (§23-461) and less than the required rear yard (§23-47) in an R-2 zoning district.

PREMISES AFFECTED – 1275 East 23rd Street, East side of East 23rd Street, 160' north of Avenue M, Block 7641, Lot 14, Borough of Brooklyn.

COMMUNITY BOARD #14BK

APPEARANCES – None.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 1:30 P.M., for continued hearing.

146-07-BZ

APPLICANT – Slater & Beckerman, LLP, for PDPR Realty Corporation, owner.

SUBJECT – Application June 5, 2007 – Application filed pursuant to §§11-411 & 11-412 for the structural alteration and enlargement of a pre-existing nonconforming two-story parking (Use Group 8) garage allowed by a 1924 BSA action. The proposal would permit the addition of a third floor and a first floor mezzanine and the expansion of the cellar in order to increase the capacity of the public parking garage from 96 cars to the proposed 147 cars. The project is located in an R8B zoning district.

PREMISES AFFECTED – 439 East 77th Street, North side of East 77th Street, Between First and York Avenues. Block 1472, Lot 17, Borough of Manhattan.

COMMUNITY BOARD #8M

APPEARANCES –

For Applicant: Stuart Beckerman.

THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson..4
Negative:.....0

ACTION OF THE BOARD – Laid over to November 20, 2007, at 1:30 P.M., for decision, hearing closed.

151-07-BZ
APPLICANT – Harold Weinberg, P.E., for John Perrone, owner.
SUBJECT – Application June 8, 2007– Special Permit (§73-622) for the enlargement of an existing single family residence. This application seeks to vary floor area, lot coverage, open space (23-141) and rear yard (23-47) in an R3-1 zoning district.
PREMISES AFFECTED – 1133 83rd Street, north side, 256'east of 11th Avenue between 11th Avenue and 12th Avenue, Block 6301, Lot 65, Borough of Brooklyn.
COMMUNITY BOARD #10BK
APPEARANCES –
For Applicant: Harold Weinberg, Frank Sellitto, III and Jose Genao.
For Opposition: Francesco Mancini, Vito Mancini and Theodore D'Alessandro.

ACTION OF THE BOARD – Laid over to November 20, 2007, at 1:30 P.M., for continued hearing.

175-07-BZ
APPLICANT – Stadtmauer Bailkin, LLP, for Kingsbridge Associates LLC, owner; Planet Fitness, lessee.
SUBJECT – Application June 28, 2007 – Special Permit (§73-36) to allow a Physical Culture Establishment in a two-story and cellar retail building in a strip mall. The proposal is contrary to section 42-00. M1-1 district.
PREMISES AFFECTED – 90 West 225th Street, south side of 225th Street between Exterior Street and Broadway, block 2215, Lot 665, Borough of Manhattan.
COMMUNITY BOARD #7M
APPEARANCES –
For Applicant: Calvin Wong.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson..4
Negative:.....0

ACTION OF THE BOARD – Laid over to November 20, 2007, at 1:30 P.M., for decision, hearing closed.

180-07-BZ
APPLICANT – Sheldon Lobel, P.C., for 47 Development LLC, owner; Rituals Spa LLC d/b/a Silk Day Spa, lessee.
SUBJECT – Application July 17, 2007 – Special Permit (§73-36) to allow the legalization of a Physical Culture Establishment on a portion of the first floor and cellar of a nine-story mixed-use building. The proposal is contrary to section 32-10. C6-2/C6-2M districts.
PREMISES AFFECTED – 47 West 13th Street, a/k/a 48 West 14th Street, north side of West 13th Street between Fifth and Sixth Avenues, Block 577, Lot 15, Borough of Manhattan.
COMMUNITY BOARD #2M
APPEARANCES –
For Applicant: Josh Rinesmith.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson..4
Negative:.....0

ACTION OF THE BOARD – Laid over to November 20, 2007, at 1:30 P.M., for decision, hearing closed.

Jeff Mulligan, Executive Director

Adjourned: P.M.