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92-10-BZ

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CALENDAR

JUNE 15, 2010, 10:00 A.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday morning, June 15, 2010, 10:00 A.M., at 40 Rector Street, 6th Floor, New York, N.Y. 10006, on the following matters:

SPECIAL ORDER CALENDAR

558-71-BZ
APPLICANT – Rothkrug, Rothkrug & Spector, LLP, for WB Management of NY LLC, owner.
SUBJECT – Application March 26, 2010 – Amendment to a previously granted Variance (72-21) to permit the change of a UG6 eating and drinking establishment to a UG6 retail use without limitation to a single use; minor reduction in floor area; increase accessory parking and increase to the height of the building façade. R3-1 zoning district.
PREMISES AFFECTED – 1949 Richmond Avenue, east side of Richmond Avenue at intersection with Amsterdam Place, Block 2030, Lot 1, Borough of Staten Island.
COMMUNITY BOARD #2SI

139-92-BZ
APPLICANT – Samuel H. Valencia, for Samuel H. Valencia-Valencia Enterprises, owners.
SUBJECT – Application April 23, 2010 – Extension of Term for a previously granted Special Permit (§73-244) for the continued operation of a UG12 Eating and Drinking Establishment with Dancing (*Deseos*) which expired on March 7, 2010; Waiver of the Rules. C2-2/R6 zoning district.
PREMISES AFFECTED – 52-15 Roosevelt Avenue, north side 125.53' east of 52nd Street, Block 1316, Lot 76, Borough of Queens.
COMMUNITY BOARD #2Q

164-04-BZ
APPLICANT – Sheldon Lobel, P.C., 2241 Westchester Avenue Realty Corporation, owner; Castle Hill Fitness Group, LLC, lessee.
SUBJECT – Application April 5, 2010 – Extension of Time to obtain a Certificate of Occupancy for a previously granted PCE (Planet Fitness) which expired on February 7, 2007; Amendment for change of operator, interior modification and change in the hours of operation; Waiver of the Rules. C2-1/R6 zoning district.
PREMISES AFFECTED – 2241 Westchester Avenue, northwest corner of Westchester Avenue and Glebe Avenue, Block 3963, Lot 57, Borough of Bronx.
COMMUNITY BOARD #10BX

280-09-A
APPLICANT – NYC Board of Standards and Appeals
SUBJECT – Review of Board decision pursuant to Sec 1-10(f) of the Board's Rules and 666(8) of the City Charter of an appeal challenging the Department of Building's authority under the City Charter to interpret or enforce provisions of Article 16 of the General Municipal Law relating to the construction of a proposed 17 story residential building. R10A zoning district.
PREMISES AFFECTED – 330 West 86th Street, south side of West 86th Street, 280 feet west of the intersection of Riverside Drive and West 86th Street, Block 1247, Lot 49, Borough of Manhattan.
COMMUNITY BOARD #7M

APPEALS CALENDAR

237-09-A & 238-09-A
APPLICANT – Rothkrug Rothkrug & Spector, LLP for Safet Dzemovski, owner.
SUBJECT – Application July 31, 2009 – Construction in the bed of a mapped street contrary to General City Law Section 35. R3X zoning district.
PREMISES AFFECTED – 81 & 85 Archwood Avenue aka 5219 Amboy Road, east side of Archwood Avenue, 198.25' north of Amboy Road, Block 6321, Lot 152 & 151, Borough of Staten Island.
COMMUNITY BOARD #3SI

67-10-A
APPLICANT – Gary D. Lenhart, R.A., for The Breezy Point Cooperative, Inc., owner; Eileen and James Conrad, lessee.
SUBJECT – Application May 4, 2010 – Proposed reconstruction and enlargement of an existing single family dwelling and the proposed upgrade of the existing non-conforming private disposal system within the bed of a mapped street is contrary to Article 3, Section 35 of the General City Law. R4 zoning district.
PREMISES AFFECTED – 72 Bedford Avenue, west side of Bedford Avenue within the intersection of mapped 12th Avenue and Beach 204th Street, Block 16350, Lot p/o 300, Borough of Queens.
COMMUNITY BOARD #14Q

CALENDAR

JUNE 15, 2010, 1:30 P.M.

NOTICE IS HEREBY GIVEN of a public hearing, Tuesday afternoon, June 15, 2010, at 1:30 P.M., at 40 Rector Street, 6th Floor, New York, N.Y. 10006, on the following matters:

ZONING CALENDAR

22-10-BZ
APPLICANT – Harold Weinberg, P.E., for RP Canarsie, LLC, owner; Sunshine Childrens Day Care, lessee.
SUBJECT – Application February 17, 2010 – Special Permit (§73-19) to allow the proposed one-story day care center. C8 zoning district.
PREMISES AFFECTED – 620 East 102nd Street, west side between Farragut Road and Glenwood Road, Block 8170, Lot 42, Borough of Brooklyn.
COMMUNITY BOARD #18BK

64-10-BZ
APPLICANT – Law Office Fredrick A. Becker, for Nechama Sonnenschine and Harry Sonnenschine, owners.
SUBJECT – Application April 29, 2010 – Special Permit (§73-622) for the enlargement of an existing single family home contrary to floor area and open space (§23-141); side yards (§23-461 & §23-48) and less than the required rear yard (§23-47). R-2 zoning district.
PREMISES AFFECTED – 1253 East 29th Street, east side of East 29th Street, between Avenue L and Avenue M, Block 7647, Lot 23, Borough of Brooklyn.
COMMUNITY BOARD #14BK

87-10-BZ
APPLICANT – Dennis D. Dell'Angelo, for David Gluck, owner.
SUBJECT – Application May 13, 2010 – Special Permit (§73-622) for the enlargement of an existing single family residence contrary to floor area and open space (§23-141), side yards (§23-461) and less than the required rear yard (§23-47). R-2 zoning district.
PREMISES AFFECTED – 1333 East 24th Street, east side of East 24th Street, 260' south of Avenue M, Block 7660, Lot 31, Borough of Brooklyn.
COMMUNITY BOARD #14BK

88-10-BZ
APPLICANT – Dennis D. Dell'Angelo, for Sarah Weiss, owner.
SUBJECT – Application May 13, 2010 – Special Permit (§73-622) for the enlargement of an existing single family residence contrary to floor area and open space (§23-141) and side yards (§23-461). R-2 zoning district.
PREMISES AFFECTED – 1327 East 21st Street, south east corner of East 21st Street and Avenue L, Block 7639, Lot 41, Borough of Brooklyn.
COMMUNITY BOARD #14BK

Jeff Mulligan, Executive Director

MINUTES

REGULAR MEETING
TUESDAY MORNING, MAY 25, 2010
10:00 A.M.

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

SPECIAL ORDER CALENDAR

4-00-BZ
APPLICANT – Eric Palatnik, P.C., for 243 West 30th Realty, LLC, owner; West Garden Incorporated, lessee.
SUBJECT – Application March 22, 2010 – Extension of Term of a previously granted Special Permit (§73-36) for the continued use of a Physical Culture Establishment (*West Garden*) which expires on May 30, 2010. M1-5 zoning district.
PREMISES AFFECTED – 243 West 30th Street, north side of West 30th Street, east of 8th Street, Block 780, Lot 15, Borough of Manhattan.
COMMUNITY BOARD #5M
APPEARANCES – None.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
Negative:.....0
THE RESOLUTION –

WHEREAS, this is an application for a reopening and an extension of term of a previously granted special permit for a physical culture establishment (PCE), which expires on May 30, 2010; and

WHEREAS, a public hearing was held on this application on May 11, 2010, after due notice by publication in *The City Record*, and then to decision on May 25, 2010; and

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

WHEREAS, Community Board 5, Manhattan, states that it has no objection to this application; and

WHEREAS, the PCE is located on the north side of West 30th Street, between Seventh Avenue and Eighth Avenue, within an M1-5 zoning district; and

WHEREAS, the PCE occupies a total of 4,264 sq. ft. of floor area on the first floor and mezzanine of a 12-story building, with an additional 1,884 sq. ft. of floor space located in the cellar; and

WHEREAS, the Board has exercised jurisdiction over the subject site since May 30, 2000 when, under the subject calendar number, the Board granted a special permit for a PCE in the subject building for a term of ten years, to expire on May 30, 2010; and

WHEREAS, on September 14, 2004, the Board amended the grant to permit the legalization of 1,884 sq. ft. of area formerly approved as PCE accessory storage and mechanical area to eight all-purpose spa therapy rooms and one all-purpose spa shower/water therapy room in the cellar; and

WHEREAS, the applicant now seeks to extend the term of the special permit for ten years; and

WHEREAS, based upon its review of the record, the Board finds the requested 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, as adopted on May 30, 2000, so that as amended this portion of the resolution shall read: "to extend the term for a period of ten years from May 30, 2010, to expire on May 30, 2020, *on condition* that all use and operations shall substantially conform to BSA-approved plans associated with the prior grant; and *on further condition*:

THAT the term of this grant shall expire on May 30, 2020;

THAT the above condition shall be listed 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;

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted."
(DOB Application No. 103161659)

Adopted by the Board of Standards and Appeals, May 25, 2010.

369-03-BZ
APPLICANT – The Law Office of Fredrick A. Becker, for 99-01 Queens Boulevard LLC, owner; TSI Rego Park LLC d/b/a New York Sports Club, lessee.
SUBJECT – Application December 3, 2009 – Amendment to a variance (§72-21) for a physical culture establishment (*New York Sports Club*) to change in the owner/operator, decrease floor area, modify days and hours of operation, and eliminate parking condition. C1-2/R7-1 zoning district.
PREMISES AFFECTED – 99-01 Queens Boulevard, Northwest corner of Queens Boulevard and 67th Street, Block 2118, Lot 1, Borough of Queens.
COMMUNITY BOARD #1Q
APPEARANCES –
For Applicant: Fredrick A. Becker.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5

Negative:.....0
THE RESOLUTION –

WHEREAS, this is an application for a reopening and an amendment to a previously granted variance for a physical culture establishment ("PCE"), to permit: (1) internal layout modifications and a correction in the floor area calculations; (2) a change in the operator of the PCE; (3) a change in the hours of operation; and (4) the removal of the requirement that off-site parking be provided; and

WHEREAS, a public hearing was held on this application on February 9, 2010, after due notice by publication in *The City Record*, with a continued hearing on April 20, 2010, and then to decision on May 25, 2010; and

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

WHEREAS, Community Board 6, Queens, recommends approval of this application; and

WHEREAS, the site is located on a corner through lot bounded by 66th Road to the west, Queens Boulevard to the south, and 67th Avenue to the east, within a C1-2 (R7-1) zoning district; and

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

WHEREAS, the PCE occupies a total of 5,790 sq. ft. of floor area on the first floor and mezzanine, with an additional 17,983 sq. ft. of floor space in the cellar; and

WHEREAS, the Board has exercised jurisdiction over the subject site since April 19, 2005 when, under the subject calendar number, the Board granted a variance to permit the operation of a PCE at the subject site; and

WHEREAS, the applicant now seeks an amendment to reflect internal layout modifications and the correct floor area calculations, including: a 1,402 sq. ft. reduction in the floor area on the first floor and mezzanine of the PCE, from a total of 25,175 sq. ft. of floor space to a total of 23,773 sq. ft. of floor space; and

WHEREAS, the applicant represents that this reduction is due to inaccuracies in the original floor area calculations; and

WHEREAS, the applicant also notes that the operating control of the PCE has changed from Sky Athletic Club to the New York Sports Club, and seeks approval of this change; 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 applicant also seeks a change in the hours of operation at the site; and

WHEREAS, the applicant states that the current hours of operation are: Monday through Thursday, from 5:00 a.m. to 11:00 p.m.; Friday, from 5:00 a.m. to 9:00 p.m.; Saturday, from 7:00 a.m. to 7:00 p.m.; and Sunday, from 7:00 a.m. to 5:00 p.m.; and

WHEREAS, the applicant now proposes to change the hours of operation at the PCE to: Monday through Thursday, from 5:30 a.m. to 11:00 p.m.; Friday, from 5:30 a.m. to 10:00 p.m.; and Saturday and Sunday, from 8:00 a.m. to 9:00 p.m.; and

WHEREAS, the applicant also requested to remove the requirement that off-site parking be provided; and

WHEREAS, the Board notes that the agreement to provide off-site parking was made between the applicant and the Community Board, and was not a condition or requirement in the Board's approval; and

WHEREAS, at hearing, the Board questioned whether the height of the signage at the site was permitted under C1 district regulations; and

WHEREAS, in response, the applicant submitted a photograph of the prior use at the site reflecting a sign located at a similar height as the proposed signage, and states that it believes the proposed signage is a permitted pre-existing condition based on the prior signage at the site; and

WHEREAS, the Board takes no position as to whether the proposed signage is a permitted pre-existing condition and defers to the Department of Buildings ("DOB") review of that matter; and

WHEREAS, pursuant to ZR §§ 72-01 and 72-22, the Board may permit an amendment to an existing variance; and

WHEREAS, based upon its review of the record, the Board finds that the requested amendments to the grant are appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *reopens* and *amends* the resolution, dated April 19, 2005, so that as amended this portion of the resolution shall read: "to permit internal layout modifications, a correction in the floor area calculations to reflect a 1,402 sq. ft. reduction of the PCE on the first floor and cellar mezzanine, a change in the operator of the PCE, and a change in the hours of operation of the PCE; *on condition* that any and all work shall substantially conform to drawings filed with this application marked "Received December 3, 2009"– (4) sheets; and *on further condition*:

THAT signage at the site shall be as approved by DOB;

THAT there shall be no change in ownership or operating control of the PCE without prior approval from the Board;

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

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

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted."
(DOB Application No. 402640157)

Adopted by the Board of Standards and Appeals, May 25, 2010.

51-06-BZ
APPLICANT – Sheldon Lobel, P.C., for Rivoli Realty Corporation, owner.
SUBJECT – Application February 4, 2010 – Amendment of a variance (§72-21) which permitted a Physical Culture Establishment, contrary to §32-00, and a dance studio (Use Group 9), contrary to §32-18. The amendment seeks to enlarge the floor area occupied by the PCE. C1-2/R2 zoning district
PREMISES AFFECTED – 188-02/22 Union Turnpike, Located on the south side of Union Turnpike between 188th and 189th Streets, Block 7266, Lot 1, Borough of Queens.
COMMUNITY BOARD #1Q
APPEARANCES –
For Applicant: Josh Rinesmith.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
Negative:.....0
THE RESOLUTION –

WHEREAS, this is an application for a reopening, an extension of time to obtain a certificate of occupancy, which expired on May 10, 2010, and an amendment to a previously granted variance for a physical culture establishment ("PCE") and dance studio, to permit a 1,072 sq. ft. enlargement of the first floor and a change in the operator of the PCE; and

WHEREAS, a public hearing was held on this application on April 13, 2010, after due notice by publication in *The City Record*, with a continued hearing on May 11, 2010, and then to decision on May 25, 2010; and

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

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

WHEREAS, the site is located on the south side of Union Turnpike, between 188th Street and 189th Street, within a C1-2 (R2) zoning district; and

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

WHEREAS, the PCE occupies a total of 8,647 sq. ft. of floor space in the cellar, and the existing dance studio occupies 1,198 sq. ft. of floor area on the first floor and approximately 3,473 sq. ft. of additional space in the cellar; and

WHEREAS, the Board has exercised jurisdiction over the subject site since December 12, 2006 when, under the subject calendar number, the Board granted a variance to permit the operation of a PCE and the legalization of the existing dance studio at the subject site, with certain conditions; and

WHEREAS, on February 10, 2009, the Board granted an extension of time to obtain a certificate of occupancy, which expired on May 10, 2010; and

WHEREAS, the applicant represents that the owner's failure to obtain the certificate of occupancy within the stipulated time was due to construction delays; and

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

WHEREAS, the applicant also seeks an amendment to permit an expansion of the PCE use to a 1,072 sq. ft. portion of the first floor, resulting in an increase in the total floor space occupied by the PCE from 8,647 sq. ft. to 9,719 sq. ft.; and

WHEREAS, the applicant states that the proposed first floor space will serve as the primary means of access to the PCE, and will be occupied by a small juice bar, reception desk, restroom, offices and an elevator and stairs to the cellar; and

WHEREAS, the applicant notes that a new elevator is being installed on the PCE's first floor as part of the proposed enlargement, and therefore the handicapped lift in the rear of the building listed on the previously-approved plans is no longer proposed; and

WHEREAS, additionally, the applicant notes that the operating control of the PCE has changed and seeks approval of this change; 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, at hearing, the Board questioned whether the signage at the site complied with C1 district signage regulations; and

WHEREAS, in response, the applicant submitted a signage analysis reflecting that the signage at the site complies with C1 district regulations; and

WHEREAS, pursuant to ZR §§ 72-01 and 72-22, the Board may permit an amendment to an existing variance; and

WHEREAS, based upon its review of the record, the Board finds that the requested extension of time to obtain a certificate of occupancy and the proposed amendments to the grant are appropriate with certain conditions as set forth below.

Therefore it is Resolved that the Board of Standards and Appeals *reopens* and *amends* the resolution, dated December 12, 2006, so that as amended this portion of the resolution shall read: "to grant an extension of time to obtain a certificate of occupancy to May 25, 2011, to permit a 1,072 sq. ft. expansion of the PCE on the first floor, and to permit a change in the operator of the PCE; *on condition* that any and all work shall substantially conform to drawings filed with this application marked "Received February 4, 2010"– (3) sheets and "May 4, 2010"-(2) sheets; and *on further condition*:

THAT signage on the site shall comply with C1 district regulations;

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

THAT a certificate of occupancy shall be obtained by May 25, 2011;

THAT there shall be no change in ownership or operating control of the PCE without prior approval from the Board;

THAT all conditions from the prior resolution not

specifically waived by the Board remain in effect;

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

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted."
(DOB Application No. 402279495)

Adopted by the Board of Standards and Appeals, May 25, 2010.

803-61-BZ
APPLICANT – Eric Palatnik, P.C., for Phillip and Martin Blessinger, owner; BP Products North America, Incorporated, lessee.
SUBJECT – Application April 27, 2010 – Extension of Term for the continued use of a Gasoline Service Station (*British Pretroleum*) which expires on November 14, 2011; Waiver of the Rules. C2-1/R3-2 zoning districts.
PREMISES AFFECTED – 1416 Hylan Boulevard, corner of Hylan Boulevard, corner of Hylan Boulevard and Reid Avenue, Block 3350, Lot 30, Borough of Staten Island.
COMMUNITY BOARD #2SI
APPEARANCES –
For Applicant: Todd Dale.

ACTION OF THE BOARD – Laid over to June 22, 2010, at 10 A.M., for adjourned hearing.

16-92-BZ
APPLICANT – NYC Board of Standards and Appeals.
OWNER: High Tech Park, Inc.
SUBJECT – Application April 21, 2009 – Dismissal for lack of prosecution for an extension of time to obtain a Certificate of Occupancy, and an Amendment to allow an additional non-conforming use on the zoning lot. R5/C1-3 zoning district.
PREMISES AFFECTED – 72/84 Sullivan Street, north side of Sullivan Street, east of Van Brunt Street, Block 556, Lot Tent.43, Borough of Brooklyn.
COMMUNITY BOARD #6BK
APPEARANCES –
In Favor: Elizabeth Safian.

ACTION OF THE BOARD – Off Dismissal Calendar. Scheduled to June 22, 2010, at 10 A.M., for Public Hearing.

336-98-BZ
APPLICANT – Rothkrug, Rothkrug & Spector LLP, for 312 Flatbush Avenue LLC, owner; Crunch LLC d/b/a Crunch, lessee.
SUBJECT – Application May 11, 2010 – Extension of Time to obtain a Certificate of Occupancy of a previously granted Special Permit (§73-36) for the operation of a Physical Culture Establishment (*Crunch Fitness*) which expired on February 11, 2010; waiver of the rules. C2-4 zoning district.
PREMISES AFFECTED – 312/18 Flatbush Avenue, Northwest corner of the intersection of Flatbush Avenue and Sterling Place, Block 1057, Lot 14, Borough of Brooklyn.
COMMUNITY BOARD #6BK
APPEARANCES –
For Applicant: Todd Dale.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to June 8, 2010, at 10 A.M., for decision, hearing closed.

337-98-BZ
APPLICANT – Rothkrug, Rothkrug & Spector LLP, for 312 Flatbush Avenue LLC, owner; Crunch LLC d/b/a Crunch, lessee.
SUBJECT – Application May 11, 2010 – Extension of Time to obtain a Certificate of Occupancy of a previously granted Special Permit (§73-36) for the operation of a Physical Culture Establishment (*Crunch Fitness*) which expired on February 11, 2010; waiver of the rules. C2-4 zoning district.
PREMISES AFFECTED – 324/34 Flatbush Avenue, Northwest corner of the intersection of Flatbush Avenue and Sterling Place. Block 1057, Lot 19, Borough of Brooklyn.
COMMUNITY BOARD #6BK
APPEARANCES –
For Applicant: Todd Dale.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to June 8, 2010, at 10 A.M., for decision, hearing closed.

APPEALS CALENDAR

300-08-A
APPLICANT – Blank Rome LLP by Marvin Mitzner, for Dutch Kills Partners, LLC, owner.
SUBJECT – Application December 9, 2008 – An appeal seeking a determination that the property owner has acquired a common law vested right to continue development under the prior M1-3 zoning district regulations. M1-2 /R5B zoning district.
PREMISES AFFECTED – 39-35 27th Street, east side of 27th Street, 125' northeast of the intersection of 27th Street and 40th Avenue, Block 397, Lot 2, Borough of Queens.
COMMUNITY BOARD #1Q
APPEARANCES –
For Applicant: Ian Rasmussen.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION –

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

WHEREAS, a public hearing was held on this application on January 26, 2010, after due notice by publication in *The City Record*, with continued hearings on March 16, 2010 and April 20, 2010, and then to decision on May 25, 2010; and

WHEREAS, the site was inspected by Chair Srinivasan, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

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

WHEREAS, several elected officials provided written and/or oral testimony in opposition to this application, including City Council Member Jimmy Van Bramer, State Assembly Member Margaret M. Markey, and State Assembly Member Catherine Nolan; and

WHEREAS, certain neighbors, represented by counsel, appeared in opposition to this appeal (hereinafter, the "Opposition"); and

WHEREAS, the subject site is located on the east side of 27th Street, between 39th Avenue and 40th Avenue, within an M1-2/R5B zoning district; and

WHEREAS, the site has approximately 50 feet of frontage along 27th Street, a depth of 100 feet, and a lot area of 5,009.5 sq. ft.; and

WHEREAS, the applicant proposes to construct a nine-story hotel building with a total floor area of 24,713 sq. ft. (4.94 FAR) (hereinafter, the "Building"); and

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

WHEREAS, however, on October 7, 2008 (hereinafter, the "Rezoning Date"), the City Council voted to adopt the Dutch Kills Rezoning, which rezoned the site to M1-2/R5B; and

WHEREAS, the applicant represents that the Building complies with the former M1-3D zoning district parameters; specifically, the proposed 4.94 FAR was permitted; and

WHEREAS, because the site is now within an M1-2/R5B zoning district, the Building would not comply with the maximum FAR of 2.0; and

WHEREAS, because the Building is not in compliance with the provisions of the M1-2/R5B zoning district and work on the foundation was not completed as of the Rezoning Date, the applicant requests that the Board find that based upon the amount of financial expenditures, including irrevocable commitments, and the amount of work completed, the owner has a vested right to continue construction and finish the proposed development; and

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

WHEREAS, the Board notes that New Building Permit No. 402569886-01-NB (the "Permit"), which authorized the development of a nine-story hotel building pursuant to M1-3D zoning district regulations was issued on December 4, 2007; and

WHEREAS, by letter dated December 17, 2009, the Department of Buildings ("DOB") states that the Permit was lawfully issued, authorizing construction of the proposed Building prior to the Rezoning Date; and

WHEREAS, the Permit lapsed by operation of law on the Rezoning Date because the plans did not comply with the new M1-2/R5B zoning district regulations and DOB determined that the Building's foundation was not complete; and

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

WHEREAS, the validity of the Permit has not been challenged; and

WHEREAS, however, DOB states that there were numerous instances of work at the subject site being performed contrary to a Stop Work Order ("SWO"); and

WHEREAS, specifically, DOB states that on May 12, 2008, while a SWO was in effect for inadequate sheeting and shoring, unlawful work on concrete forms and the pouring of concrete was observed at the site; and

WHEREAS, DOB further states that on June 2, 2008, an inspector observed unlawful underpinning of the adjacent building located at 39-39 27th Street, and a SWO was again issued, with the only permitted work being sheeting and shoring; and

WHEREAS, subsequently, on September 12, 2008, DOB partially rescinded the SWO to allow for foundation and concrete work on all but the southern portion of the site; however, DOB states that on September 15, 2008 and September 18, 2008 an inspector observed unlawful foundation work at the site; and

WHEREAS, the applicant represents that at least some of the unlawful work performed at the site was due to the contractor's mistaken interpretation as to the extent of the SWOs issued by DOB, and states that a portion of the work performed on the above-mentioned dates was within the scope of permitted work under the SWOs; and

WHEREAS, nonetheless, the applicant states that it has eliminated all work performed on the above dates from the vested rights analysis; and

WHEREAS, assuming that valid permits had been issued and that work proceeded under them, the Board notes that a common law vested right to continue construction generally exists where: (1) the owner has undertaken substantial construction; (2) the owner has made substantial expenditures; and (3) serious loss will result if the owner is denied the right to proceed under the prior zoning; and

WHEREAS, specifically, as held in Putnam Armonk,

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

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

WHEREAS, as to substantial construction, the applicant states that before the Rezoning Date, the owner completed: (1) site preparation; (2) 75 percent of the excavation; (3) the creation of concrete forms for foundation, footings, and underpinning; and (4) the pouring of 25.89 cubic yards of concrete required for footings, 24.85 cubic yards of concrete required for the foundation, and 19 cubic yards of concrete required for underpinning; for a total of 69.74 cubic yards of concrete, or approximately 24 percent, out of a total of approximately 290 cubic yards of concrete required for all foundation work; and

WHEREAS, in support of this assertion, the applicant submitted the following evidence: photographs of the site; an affidavit from the engineer stating the amount of work completed; a construction schedule; copies of concrete pour tickets; cancelled checks; and accounting tables; and

WHEREAS, the applicant notes that a total of 85 cubic yards of concrete was poured at the site as of the Rezoning Date, but that it has not included more than 15 cubic yards of concrete that have been called into question as being related to work performed contrary to a SWO; and

WHEREAS, the Opposition argues that, while the work performed at the site as of the Rezoning Date may constitute 24 percent of the total work necessary to complete the foundation, it only constitutes approximately three percent of the work necessary to complete the entire project, and therefore substantial construction has not been completed; and

WHEREAS, the Board notes that, pursuant to ZR § 11-331, DOB would have vested the project if work on the foundation had been completed as of the Rezoning Date, and the Board could have granted an extension of time to complete construction upon a finding that excavation was complete and substantial progress made on foundations as of the Rezoning Date; thus, the Board finds it appropriate to consider the construction completed at the site not only in the context of the amount of work necessary to complete the entire project, but also in the context of the amount of work necessary to complete the foundation; and

WHEREAS, the Board concludes that given the size of the site, and based upon a comparison of the type and amount of work completed in the instant case with the type and amount of work discussed by New York State courts, a significant amount of work was performed at the site prior to the rezoning; and

WHEREAS, accordingly, as to the amount of work performed, the Board finds that it was substantial enough to meet the guideposts established by case law; and

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

WHEREAS, the applicant states that prior to the Rezoning Date, the owner expended $820,231, including hard and soft costs and irrevocable commitments, out of $3,837,850 budgeted for the entire project; and

WHEREAS, as proof of the expenditures, the applicant has submitted construction contracts, invoices, cancelled checks, contractors applications for payment, accounting tables, and concrete pour tickets; and

WHEREAS, in relation to actual construction costs and related soft costs, the applicant specifically notes that the owner had paid $546,700 for excavation, shoring, installation of foundations, architectural fees, and engineering fees; and

WHEREAS, the applicant further states that the owner also irrevocably owes an additional $273,531 in connection with costs committed to the development under irrevocable contracts prior to the Rezoning Date; and

WHEREAS, at hearing, the Opposition challenged the veracity of the documentation provided by the applicant in support of approximately $259,000 in costs related to the production of shop drawings, commencement of fabricating custom structural steel for the project, and metal decking which was purchased by the contractor and remains in his shop, and argues that such costs should be discounted from the expenditures; and

WHEREAS, the applicant has submitted original notarized copies of the relevant contractor's applications for payment in response to the Opposition's concerns and the Board's request, and the Board finds this evidence to be sufficient documentation of the expenditures at issue; and

WHEREAS, the Opposition argues that $227,818 in expenditures related to architectural fees, general contractor fees, the purchase of steel, franchise fees, and other miscellaneous expenses related to the Building should be discounted from the analysis of substantial expenditures because they were made prior to the issuance of a valid permit; and

WHEREAS, in support of this argument, the applicant has cited a number of cases, see Town of Orangetown v. Magee, 88 N.Y.2d 41 (1996); Westbury Laundromat Inc., v. Mammina, 62 A.D.3d 888 (2d Dept. 2009); Lefrak Forest Hills Corp v. Galvin, 40 A.D. 2d 211 (2d Dept. 1972); Preble Aggregate v. Town of Preble, 263 A.D.2d 849 (3d Dept. 1999); Rudolf Steiner Fellowship Foundation v. DeLuccia, 90 N.Y.2d 453 (1997); Reichenbach v. Windward at Southampton, 80 Misc.2d 1031 (Supreme Court, Suffolk County, 1975) which recite the requirement that substantial

construction be performed and substantial expenditures made *in reliance on a validly issued permit* (emphasis added); and

WHEREAS, the Board acknowledges that construction and expenditures must be made in reliance on a validly issued permit, but does not find the relevant consideration to be solely whether the costs were incurred or the payments made before or after the issuance of the permit, but rather whether such costs were specifically made in reliance upon such permit, be it issued or anticipated; and

WHEREAS, the Board notes that this issue was addressed in Glenel Realty Corp. v. Worthington, 4 A.D.2d 702 (2d Dept. 1957), where the court included costs in the vested rights analysis that were alleged to have been made prior to the issuance of a permit, finding that it was "immaterial under the circumstances here present that some of these obligations and some of these payments may have antedated the permits…all the obligations may well be said to have been justifiably assumed and all payments may well be said to have been justifiably made in reliance on the permits—whether such reliance was upon their anticipated, or upon their actual, issuance;" and

WHEREAS, the Board further notes that in Town of Orangetown v. Magee, one of the cases cited by the Opposition in support of its contention that all pre-permit expenses must be excluded from the vested rights analysis, the court included the purchase price of the original site, as well as the subsequent purchase of additional land, as part of the substantial expenditures that were made in reliance on the building permit, despite the fact that the land was purchased prior to the issuance of a valid building permit; and

WHEREAS, the Board finds that in the instant case, the $227,818 in costs incurred or commitments made prior to the issuance of the building permit included payments for building materials and fees paid in anticipation of this specific project, and therefore such costs were made in reliance on the subsequently issued building permit; and

WHEREAS, the Opposition argues that the excavation work performed for the project would be necessary for any development at the site, and cites to Town of Hempstead v. Lynne, 32 Misc. 2d 312 (Supreme Ct., Nassau County, 1961) to support its contention that the excavation work and its associated costs should not be counted in the vested rights analysis because the costs were not exclusive to this project; and

WHEREAS, the Board notes that excavation work is expressly considered as part of the statutory analysis for an extension of time to complete construction under ZR § 11-331, and similarly finds the inclusion of such work and its associated costs to be appropriate under the common law; and

WHEREAS, further, the Board finds that the applicant has demonstrated that substantial construction has been undertaken and substantial expenditures made even if excavation work is excluded from the vested rights analysis; and

WHEREAS, the Opposition also argues that the $31,000 associated with the demolition of the existing buildings on the site should be deducted from the expenditures in the vested rights analysis, as the costs were made prior to the issuance of a valid permit, and because such costs are not exclusive to this project; and

WHEREAS, the applicant argues that the demolition was performed in reliance on the Permit, as it would not have demolished the two viable buildings on the site except in reliance upon the proposed development; and

WHEREAS, the Board acknowledges that demolition costs are not precluded from consideration in the vested rights analysis, but finds that the relevance of demolition costs may be difficult to ascertain in many circumstances; and

WHEREAS, the Board concludes that in the instant case, it is more appropriate to assess expenditure in light of total development costs absent demolition costs; and

WHEREAS, accordingly, the $820,231 in total expenditures does not include the $31,000 in costs associated with the demolition of the existing buildings; and

WHEREAS, the Board considers the amount of expenditures significant, both in and of itself for a project of this size, and when compared against the total development costs; and

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

WHEREAS, as to serious loss, the Opposition argues that it is not a factor to be established separate and apart from substantial construction and substantial expense, but rather is considered only in the context of the extent and cost of the actual construction performed, and that according to Town of Orangetown v. Magee, 88 N.Y.2d 41, 643 (1996), "the landowner's actions relying on a valid permit must be so substantial that municipal action results in serious loss rendering the improvements essentially valueless;" and

WHEREAS, the Board notes that although it is not required by case law to consider the landowner's loss outside the scope of the substantial construction and expenditures paradigm, it finds such a consideration allows it to gain a better understanding of the tangible effect a rezoning will have on a development; and

WHEREAS, the Board further notes that its consideration of such loss does not obscure the fact that vested rights cannot be conferred without a finding that substantial construction has been undertaken and substantial expenditures made in reliance on a valid building permit; and

WHEREAS, based upon the above, the Board considers not only whether certain improvements and expenditures could not be recouped under the new zoning, but also considerations such as the diminution in income that would occur if the new zoning were imposed and the reduction in value between the proposed building and the building permitted under the new zoning; and

WHEREAS, the applicant contends that the loss of approximately 14,694 sq. ft. of floor area that would result if this appeal is denied is significant; and

WHEREAS, the applicant states that the decrease in the permissible floor area under the new zoning would result in the elimination of 35 hotel rooms, from a 57-room hotel to a 22-room hotel, constituting approximately 61 percent of the

hotel's rooms; and

WHEREAS, the applicant provided a financial analysis indicating an expected loss of approximately $2,036,324 on a 22-room hotel project; and

WHEREAS, the applicant represents that a complying residential development at the site would result in an estimated loss of $1,588,622, in light of the expenditures and financial commitments made in furtherance of the hotel project; and

WHEREAS, the applicant states that, in order to realize a reasonable rate of return on the premises, the owner entered into a franchise agreement with Howard Johnson and that it would be unable to maintain that franchise agreement with the elimination of 35 hotel rooms; and

WHEREAS, the applicant submitted a letter from Wyndham Hotel Group, the parent company to the Howard Johnson's brand, stating that it has a 50-room project minimum and would not be interested in a 22-room hotel; and

WHEREAS, the applicant also submitted letters from a second national hotel chain as well as a smaller hotel company indicating that a 22-room hotel would not be feasible, and a letter from a real estate broker stating that no franchise would be willing to consider a hotel with such a reduced room count, and that such a project would not be financially feasible; and

WHEREAS, the applicant represents that Howard Johnson may also hold the owner in default of the franchise agreement if it were required to eliminate 35 rooms and the owner would then be subject to a $124,000 penalty for cancellation of its franchise agreement; and

WHEREAS, the Board agrees that the serious reduction in FAR, the loss of 35 hotel rooms, and the need to redesign would result in a serious economic loss, and that the supporting data submitted by the applicant supports this conclusion; and

WHEREAS, in sum, the Board has reviewed the representations as to the work performed, the expenditures made, and serious loss, and the supporting documentation for such representations, and agrees that the applicant has satisfactorily established that a vested right to complete construction of the Building had accrued to the owner of the premises as of the Rezoning Date.

Therefore it is Resolved that this appeal made pursuant to the common law of vested rights requesting a reinstatement of DOB Permit No. 402569886-01-NB, as well as all related permits for various work types, either already issued or necessary to complete construction and obtain a certificate of occupancy, is granted for four years from the date of this grant.

Adopted by the Board of Standards and Appeals, May 25, 2010.

303-09-BZY

APPLICANT – Ray Chen, for 517 53rd Street Inc, owner.

SUBJECT – Application October 30, 2009 – Extension of time (§11-332) to complete construction of an enlargement commenced under the prior C4-3 zoning district. R6B zoning district

PREMISES AFFECTED – 517 53rd Street, between 5th and 6th Avenue, Block 608, Lot 69, Borough of Brooklyn.

COMMUNITY BOARD #7BK

APPEARANCES –

For Applicant: Todd Dale.

ACTION OF THE BOARD – Application withdrawn.

THE VOTE TO WITHDRAW –

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

Negative:.....0

Adopted by the Board of Standards and Appeals, May 25, 2010.

1-10-A

APPLICANT – Elizabeth Safian, for Ciro Faiella & Joseph Faiella, owner.

SUBJECT – Application January 4, 2010 – Appeal to an Order of Closure issued by the Department of Buildings. Per the Order, the site's commercial vehicle storage, public parking lot, trucking terminal and a salvage yard uses constitute an illegal use in a residential district contrary to Administrative Code Section 28-212.2. R5 zoning district.

PREMISES AFFECTED – 527 East 86th Street, 116' east of Foster Avenue, fronting East 86th Street, Block 7965, Lot 33, Borough of Brooklyn.

COMMUNITY BOARD #18BK

APPEARANCES –

For Applicant: Elizabeth Safian.

ACTION OF THE BOARD – Appeal denied.

THE VOTE TO GRANT –

Affirmative: 0

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

THE RESOLUTION: 1

WHEREAS, this is an appeal of an Order of Closure for the subject premises, issued by the Commissioner of the Department of Buildings ("DOB") on December 3, 2009 (the "Order"), brought by the property owner (hereinafter "Appellant"); and

WHEREAS, the Order states, in pertinent part:

> "It is my determination that the storage of commercial vehicles, a public parking lot, a trucking terminal, and a salvage yard constitute illegal commercial and/or manufacturing uses in a residence district and, therefore, the subject premises is ORDERED CLOSED . . ."; and

WHEREAS, a public hearing was held on this appeal on April 13, 2010 after due notice by publication in *The City Record*, and then to decision on May 25, 2010; and

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

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

Commissioner Ottley-Brown; and

WHEREAS, Community Board 18, Brooklyn, provided written testimony in opposition to the appeal and in support of the closure of the site; and

WHEREAS, the subject site is located on the north side of East 86th Street, between Foster Avenue and Farragut Road, in an R5 zoning district; and

WHEREAS, the site is irregularly-shaped with 159 feet of frontage on East 86th Street and a lot area of approximately 16,000 sq. ft.; and

WHEREAS, the site is occupied by a two-story residential building, a one-story commercial building with a floor area of approximately 1,575 sq. ft., which is occupied by offices for a food service program, and several trailers; and

WHEREAS, the Appellant states that the open portion of the site is used for truck parking, but not for a public parking lot, trucking terminal, or salvage yard, as stated in the Order; and

WHEREAS, the subject appeal is limited to the continued operation of the truck parking use; and

WHEREAS, the certificate of occupancy ("CO") for the site, dated December 23, 1959, reflects the following: cellar – ordinary; first/second – one-family; first - restaurant; and parking spaces for two cars; and

CRITERIA FOR MAINTAINING A NON-CONFORMING USE

WHEREAS, DOB and the Appellant agree that the site is currently within an R5 zoning district and that the existing truck parking and other uses currently active at the site, including the Use Group 6 office use, are not permitted as-of-right uses within the zoning district; and

WHEREAS, accordingly, in order to establish the affirmative defense that the non-conforming truck parking use is permitted to remain, the Appellant must meet the ZR criteria for a "non-conforming use" as defined at ZR § 12-10; and

WHEREAS, ZR § 12-10 defines "non-conforming" use as "any lawful *use*, whether of a *building or other structure* or of a tract of land, which does not conform to any one or more of the applicable *use* regulations of the district in which it is located, either on December 15, 1961 or as a result of any subsequent amendment thereto"; and

WHEREAS, additionally, ZR § 52-61 – Discontinuance - Non-Conforming Uses – General Provisions - states that: "If, for a continuous period of two years, either the *non-conforming use* of *land with minor improvements* is discontinued, or the active operation of substantially all the *non-conforming uses* in any *building or other structure* is discontinued, such land . . . shall thereafter be used only for a conforming *use*"; and

WHEREAS, accordingly, as per the ZR, the applicant must establish that the use was established before it became unlawful, by zoning, on December 15, 1961 and it must have continued without any two-year period of discontinuance since then; and

WHEREAS, neither DOB nor the Appellant contest that this is the appropriate standard to apply to the analysis of whether the non-conforming truck parking use may continue at the site; and

PROCEDURAL HISTORY

WHEREAS, DOB states that its inspectors observed nonconforming use at the site, leading to five inspection reports noting such use; and

WHEREAS, DOB determined that truck parking and other noted uses were not permitted in the subject R5 zoning district and proceeded to enforce against Appellant pursuant to Administrative Code § 26-127.2, otherwise known as the Padlock Law; and

WHEREAS, in sum and substance, the Padlock Law provides DOB with the authority to declare illegal commercial uses in residential zoning districts to be a nuisance, and to then close such uses; and

WHEREAS, however, prior to the issuance of an Order of Closure, the Padlock Law provides that the owner is entitled to a hearing at the City's Office of Administrative Trials and Hearings ("OATH"); and

WHEREAS, on February 3, 2009, DOB served a petition against the Appellant, asserting a violation of ZR § 22-00, specifically that the site "is in violation of the Zoning Resolution in that, although located in an R5 residence district, the premises has been used for the storage of commercial vehicles, and as a public parking lot, a trucking terminal, and a salvage yard. Such occupancy is contrary to the Zoning Resolution, which does not permit as-of-right commercial or manufacturing uses in residence districts"; and

WHEREAS, on May 8, 2009, DOB served an amended petition, which also asserts that the site is illegally used as an ice manufacturing business; and

WHEREAS, on July 10, 2009, OATH held a hearing on the matter; and

WHEREAS, by a Report and Recommendation, dated October 23, 2009, OATH issued a recommendation for closure of non-conforming use at the site; and

WHEREAS, subsequently, DOB issued its Order; and

WHEREAS, pursuant to the City Charter, Appellant may appeal the Order to the Board, and the Board has the authority to review the validity of the Order and the underlying issues *de novo*; it is not bound by any finding or determination of OATH, nor is any other party; and

WHEREAS, accordingly, the Appellant appealed the Order to the Board; OATH's Report and Recommendation has been entered as a part of the record on appeal, but the Board has not relied on it in its analysis; and

SITE HISTORY

WHEREAS, the Appellant states that between 1953 and 1961, the northern 200 feet of Block 7965, perpendicular to Foster Avenue was located within a manufacturing zoning district; and

WHEREAS, tax maps reflect that the site is approximately 116 feet from Foster Avenue; and

WHEREAS, accordingly, the Appellant asserts that, until 1961 a zoning district boundary line divided the site and the northern portion of the site, to a width of 84 feet (the "Northern Portion") was within a manufacturing zoning district while the southern portion of the site, to a width of 75 feet (the "Southern Portion") was within a residential zoning district; and

WHEREAS, in 1961, the entire site was zoned R5,

which it remains today; and

WHEREAS, the Appellant states that the truck parking use began in the mid-1950s, when such use was permitted on the Northern Portion; and

WHEREAS, the Appellant asserts that his grandfather purchased the site in the 1950s, when Lot 33 was under a different lot configuration, as part of Lot 39 that extended to the corner of East 86th Street and Foster Avenue; Lot 39 no longer exists; and

WHEREAS, the Appellant states that his grandfather operated a restaurant on a portion of the larger original lot (Lot 39) which has since been subdivided and is now under separate ownership from Lot 33; and

WHEREAS, the Appellant has submitted earlier COs for what was then Lot 39, which reflect a restaurant use near to the corner of East 86th Street and Foster Avenue; and

WHEREAS, the Appellant does not have information to explain the full history of the configuration of lots 33 and 39 throughout the 1950s, so questions remain as to which lots were occupied by which activities prior to 1961; and

WHEREAS, however, the Appellant states that he took control of the truck parking business, which passed through his mother, in the mid-1970s; and

WHEREAS, the Appellant continues to operate the truck parking business at the site, which consists of patrons renting space to park trucks in the open area on the current Lot 33; and

WHEREAS, the Appellant has submitted business records dating back to 1976, which reflect that he has collected rent from entities to park commercial vehicles since that time; and

WHEREAS, based on the business records dating from 1976 to 2009, DOB stipulated at the OATH hearing that the Appellant had established that the site was used continuously for truck parking from 1976 to 2009; and

WHEREAS, however, as noted, DOB requires that the Appellant establish that the trucking use, which was rendered non-conforming by the 1961 R5 zoning designation, existed on the Northern Portion prior to 1961 and that it continued without any interruption of two years until 1976; and

WHEREAS, DOB states, and the Appellant acknowledges, that the truck parking business cannot be established as a pre-existing non-conforming use on the Southern Portion because such use was not permitted under the pre-1961 zoning scheme or under the current R5 designation; and

WHEREAS, the Appellant concedes that he does not have any ability to legally establish or maintain the use on the Southern Portion; accordingly, the subject of this appeal is the Northern Portion and establishing the pre-existence and continuation of the use there; and

APPELLANT'S ARGUMENTS

1. Commercial Vehicle Parking Can Be Established Notwithstanding Its Absence on the Current CO

WHEREAS, the Appellant contends that the truck parking use has existed at the site since the late 1950s, but that the business was an informal one which lacks record-keeping of any kind and that the original owners and many others who may have had firsthand knowledge of the use are deceased; and

WHEREAS, the Appellant concedes that the only remaining record of the use prior to 1976 is anecdotal evidence provided by individuals familiar with the site during the relevant period; and

WHEREAS, the Appellant asserts that the current use may continue despite the fact that it is not reflected on the current CO, issued in 1959; and

WHEREAS, the Appellant states that the CO was silent regarding commercial vehicle parking, but that that should not preclude him from establishing that the use has existed there, legally, nonetheless; and

WHEREAS, the Appellant relies on City of New York v. Victory Van Lines (69 A.D.2d 605, 418 N.Y.S.2d 792 (2d Dept. 1979)), for the premise that the absence of a CO reflecting a particular use does not preclude a property owner from establishing the existence of such use; and

WHEREAS, specifically, the Victory Van Lines court stated "'[w]here the invalidity of the use prior to the effective date of the zoning restrictions lies in failure to secure a license, such invalidity does not preclude acquisition of a non-conforming use protected as against the operation of a subsequent zoning restriction'" (citations omitted) 69 A.D.2d 605 at 610; and

WHEREAS, the Appellant also cites to Matter of Kennedy v. Zoning Board of Appeals of Town of North Salem (205 A.D.2d 629, 613 N.Y.S.2d 264 (2d Dept. 1994)), another case involving a rezoning that rendered a use non-conforming and what bearing the absence of a CO reflecting the non-conforming use had on the ability to continue the use; and

WHEREAS, the court in Kennedy stated that "[t]he failure to obtain a license does not render the use unlawful in the sense intended by zoning ordinances which preserve existing lawful uses" and "even assuming that a Certificate of Occupancy was in fact required, '[a] use which is otherwise lawfully maintained may be continued as a nonconforming use although the use failed to procure or renew a license, certificate, or other permit required by law,'" 205 A.D.2d at 631; and

WHEREAS, DOB distinguishes Victory Van Lines in that the nonconforming use in the subject case was not established as a legal nonconforming use prior to 1961, in part because it was not reflected on the CO, which would have been a requirement since truck parking, unlike the parking in Victory Van Lines, is not accessory to the primary use at the site, a restaurant and a residence; and

WHEREAS, the Board finds that the case law supports the argument that the analysis is not limited to whether the now non-conforming use was reflected on the CO; and

WHEREAS, the Board finds that it may determine that a non-conforming use can be established as having existed on a site in the manner required to establish the legality of the use prior to a zoning change; and

WHEREAS, guided by the courts, the Board does not find the omission of the truck parking business from the CO to be conclusive evidence that the use did not exist legally on December 15, 1961; and

WHEREAS, that said, the Board distinguishes the

subject case from Victory Van Lines and Kennedy in at least two important ways: (1) in Victory Van Lines and Kennedy, the property owners were able to establish the existence of the non-conforming use prior to the effective date of the zoning change and (2) COs were not required for non-conforming uses at issue on their sites; and

WHEREAS, the use in Victory Van Lines dates back to approximately 1925, 36 years before the site was rezoned to residential use and the court found that the truck parking was accessory to the warehousing use at the site and, thus, a CO was not required to reflect the accessory use; the use in Kennedy, similarly, did not require a CO prior to a 1987 zoning ordinance adoption; and

WHEREAS, the Board notes that, on the contrary, the Appellant obtained a CO on December 23, 1959, for a use that was completely unrelated to commercial truck parking, just two years before the December 15, 1961 effective date of the ZR and within a few years of the purported late 1950s establishment of the use; and

WHEREAS, additionally, the Board does not find a compelling argument for why the Appellant omitted the truck parking use, which would have been a permitted use on the Northern Portion at the time of the CO's issuance, from the CO, if it was an established use at the site at that time; and

WHEREAS, the Board notes that the question of omitting an existing use, which would have been required to be noted on the CO from the CO at the time of its issuance was not the question in Victory Van Lines or Kennedy; and

2. Statutory Interpretation Principles and Estoppel Require a Decision in the Property Owner's Favor

WHEREAS, the Appellant asserts several general statutory interpretation principles in support of its claim that the non-conforming use should be permitted; and

WHEREAS, specifically, the Appellant states that the zoning regulations be strictly construed against the municipality seeking enforcement, citing to Ellington Construction v. Zoning Board of Appeals of Incorporated Village of New Hempstead (77 N.Y.2d 114, 564 N.Y.S.2d 1001 (1990)) and Glenel Realty Corp. v. Worthington (4 A.D.2d 702, 164 N.Y.S. 2d 635 (2d Dept. 1957)) and that the property owners be given every benefit in the interpretation of zoning ordinances; and

WHEREAS, the Board finds the citation to these cases to be misplaced as the subject case does not involve a question of interpretation, but rather one of meeting a threshold for establishing the existence of a use, which does not require interpretation, but rather evidence to support claims; and

WHEREAS, further, the Board notes that, with regard to non-conforming uses, the Court of Appeals has held that there is an exception to the general principle that the zoning ordinance be strictly construed in favor of the property owner; and

WHEREAS, in Off Shore Restaurant Corp. v. Linden (30 N.Y.2d 160, 331 N.Y.S.2d 397 (1972)), the Court stated, "the courts do not hesitate to give effect to restrictions on non-conforming uses . . . It is because these restrictions flow from a strong policy favoring the eventual elimination of nonconforming uses" 30 N.Y.2d at 164; and

WHEREAS, additionally, the Board notes that the ZR contemplates the continuation of certain nonconforming uses and sets forth criteria for establishing the legality of such use; and

WHEREAS, the Board agrees with the Appellant that the ZR expressly permits the continuation of non-conforming uses under certain conditions and does not find that the requirement to establish the commencement of the use prior to the adoption of the 1961 ZR or the continuation of the use from 1961 to 1976 to be in conflict with the property owner's rights or the intent of the ZR or relevant case law; and

WHEREAS, the Board finds that the Appellant's arguments related to serious loss and estoppel are similarly misplaced in an analysis of whether or not a use can be established as legally non-conforming; and

WHEREAS, the Board notes that the Court of Appeals has rejected estoppel as a defense in a zoning case even when DOB has erroneously issued a permit and then revoked it; the Court held that "'estoppel is not available against a local government for the purpose of ratifying an administrative error,'" Parkview Associates v. City of New York, 71 N.Y.2d 274, 283 (1988) (citation omitted), See also Accord Schorr v. New York City Dept. of Housing Preservation and Development, 10 N.Y.3d 776, 779 (2008); and

WHEREAS, the Board also notes that the Court in Parkview rejected a claim of vested rights and severe economic loss, finding that there was not any vested rights where the permit was invalid when issued and not in compliance with the law; and

WHEREAS, the Board notes that, the Appellant's claim for estoppel is even less persuasive than the property owner in Parkview because the property owner in Parkview had actually obtained approvals, however erroneously, from DOB; in the subject case, Appellant relies on DOB's lack of enforcement and absence of earlier violation of the non-conforming use at the site as a tacit approval; and

WHEREAS, the Board notes that DOB has not approved the use of the site since its issuance of the 1959 CO and it is not known whether DOB actually visited the site at that time and confirmed that all of the existing uses were appropriately reflected on the new CO; and

WHEREAS, DOB is unable to confirm the circumstances of the issuance of the CO; and

THE EVIDENCE

WHEREAS, in support of claims that the truck parking business has operated at the site from the 1950s to 1976 without interruption, six individuals appeared at hearing and described recollections of seeing trucks at the site; and

WHEREAS, the Appellant states that the testimony presented at hearing was not available at the time of the OATH hearing and came from those who lived nearby or visited the area during the relevant time period; and

WHEREAS, the Board notes that the testimony included statements from people who lived nearby and recalled seeing trucks at the site during the relevant period, which except for one individual who lived nearby and claimed to use the site for parking, was in the nature of casual observation; and

WHEREAS, the documentary evidence provided from the individual who asserts that he parked trucks for his business at the site for the relevant periods includes a certificate of incorporation for his business, which required the use of trucks, dated 1966; and

WHEREAS, although the Board did not find any reason to discredit the testimony, the Board notes that the testimony failed to establish (1) that the use existed at the site prior to December 15, 1961, (2) a timeline of continuous use from prior to December 15, 1961 to 1976, and (3) that the truck parking use was present on what is currently the Northern Portion of Lot 33; and

WHEREAS, the Board concludes that the testimony, which lacked specificity, and the limited documentary evidence alone cannot support the assertions that the use existed on the Northern Portion and not instead the Southern Portion or the earlier lot configuration, including former Lot 39, or even an adjacent un-related lot, throughout the relevant periods; and

THE STANDARD OF REVIEW

WHEREAS, the Appellant cites to Stein v. Board of Appeals of Town of Islip, 100 A.D. 2d 590, 473 N.Y.S.2d 535 (2d Dept 1984), to support the assertion that the rules of evidence need not be strictly applied by a zoning board; specifically "[a] zoning board of appeals is not constrained by the rules of evidence and may conduct informal hearings," 100 A.D. 2d at 590; and

WHEREAS, instead of the rules of evidence, the Appellant states that the Board may base its determination on "substantial evidence" as set forth in New York's Civil Practice Law and Rules § 7803(4); and

WHEREAS, the Appellant cites to several New York State cases to describe what it finds to be the "substantial evidence" standard within a zoning context; and

WHEREAS, DOB finds that the Appellant has not met the substantial evidence standard; and

WHEREAS, the Board agrees with the Appellant that it is not required to follow the rules of evidence and may base its determination on a different standard, but is able to distinguish cases the Appellant cites, on the facts; and

WHEREAS, the Appellant cites to 300 Gramatan Ave. Associates v. State Div. of Human Rights (45 N.Y.2d 176, 179, 408 N.Y.S.2d 54 (1978)), in which the Court of Appeals stated that "upon a judicial review of findings made by an administrative agency, a determination is regarded as being supported by substantial evidence when the proof is 'so substantial that from it an inference of the existence of the fact found may be drawn reasonably'" (citation omitted); and

WHEREAS, the Appellant identifies substantial evidence as involving weighing the quality and quantity of the proof and that there is sufficient relevant proof so that a reasonable mind may accept it as adequate to support a conclusion of fact and that substantial evidence is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt, citing to Gramatan and Siano v. Dolce, 256 A.D.2d 582, 682 N.Y.S.2d 445 (2d Dept. 1998); and

WHEREAS, Gramatan involved a potential tenant for an apartment who claimed that he was prohibited from renting the apartment because of his race; he was able to provide a clear timeline of the events and communication surrounding his rejection from the rental to the extent that the Court stated: "substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably and probatively and logically," 45 N.Y.2d at 181; and

WHEREAS, additionally, the Appellant states that courts have relied on testimonial evidence to establish the continuity of a non-conforming use; and

WHEREAS, the Appellant cites to Walter v. Harris (163 A.D.2d 619, 558 N.Y.S.2d 266 (3d Dept. 1990)), which involved a dispute between neighbors as to whether the storage and maintenance of heavy equipment and vehicles could be established as a pre-existing legal non-conforming use in that it pre-dates the relevant zoning ordinance; and

WHEREAS, the property owner seeking to establish the pre-existence of the use offered testimony from his father, the former owner, that he had witnessed the use at the site for approximately 45 years; and

WHEREAS, the Board notes that the court in Walter accepted testimonial evidence from the property owner's father but that, as in Gramatan, there were additional facts set forth beyond testimonial evidence; and

WHEREAS, additional factors in Walter include that: (1) the property owner's 200-year-old family business of timber harvesting and wood processing was directly related to the vehicle parking such that although the timber business was not a primary use at the site, there was a clear un-interrupted connection between the use of the site and the property owner's continuous nearby business; (2) the purported discontinuation of the use for 18 months while the site was leased out was the neighbor's primary contention rather than that the use could not be established as existing before the enactment of the zoning ordinance or that there were other interruptions; and (3) because the site had not been reconfigured and was not separated by a zoning district boundary line, it was only necessary to establish the pre-existence and continuation of the non-conforming use somewhere on the site rather than on a specific part of the site as in the subject case; and

WHEREAS, the court found that the 18-month period during which the property was leased to another timber-harvesting business before being returned to the original owner who built a garage for the storage of equipment did not disrupt the continuity of the use; and

WHEREAS, the Board finds that, due to the history of use at the site at issue in Walter and the continuous configuration of the lot, the testimony had significant specificity and the quality of the evidence in Walter is greater than that in the subject case, which involves (1) impressionistic testimony from casual observers, (2) a less tangible link between the property owners and the use of the site for the non-conforming use, and (3) a meaningful evolution of the lot boundaries that is not apparent to casual observers, but which is critical because the use's presence on the Southern Portion or on adjacent lots does not support the continuation of the use on the Northern Portion; and

WHEREAS, the Board has considered the criteria for establishing substantial evidence including (1) the quality and quantity of the evidence, (2) the specificity of the testimony, and (3) whether there is any evidence to support the testimony; and

WHEREAS, the Board finds that the quality of the evidence is insufficient to establish the required criteria because it lacks critical specificity regarding a continuous timeline and the exact location of the use on the lot; and

WHEREAS, the witnesses' testimony involved casual recollections and was not rooted in evidence like the strong fact-based foundation set forth in Gramatan and Walter, and, thus, concludes that the substantial evidence threshold, as described by the courts in those cases, has not been met; and

WHEREAS, as to the credibility of the witnesses, the Board does not find any reason to discredit their testimony; and

WHEREAS, the Appellant cites to cases which state that zoning board's have the ability to weigh the evidence and state that "where there is room for choice, neither the weight which might be accorded or the choice which might be made by a court are germane upon an analysis for the presence of substantial evidence before the commissioner," 45 N.Y.2d at 179; and

WHEREAS, further, the Appellant notes that "the Court must give deference to the findings of the board" (E & B Realty v. Zoning Board of Appeals of the Village of Roslyn, 275 A.D.2d 779 (2d Dept. 2000)) and "may not weigh the evidence or reject the choice made by the zoning board 'where the evidence is conflicting and room for choice exists'" (Wickes v. Kaplan, 1/2/2002 N.Y.L.J. 20 (col. 5) (2d Dept. 2002)); and

WHEREAS, the Board has weighed the evidence and determined that the Appellant is not able to establish (1) whether the use existed on the Northern Portion prior to 1961; (2) where on the lot, which changed dimensions throughout time, and is divided by a zoning district boundary line not visible to the casual observer, the use existed; and (3) whether there was continuity of the use from 1961 to 1976; and

CONCLUSION

WHEREAS, in sum, the Board concludes as follows: (1) the truck parking use was permitted by zoning on the Northern Portion at the time of the December 23, 1959 issuance of the CO for Lot 33; (2) Appellant has not established that the commercial truck parking use existed on the Northern Portion as of December 15, 1961; (3) the Appellant has not established that the truck parking use has continued on the Northern Portion, without a two-year interruption from 1961 to 1976; and (4) thus, the truck parking use does not meet the criteria required for continuing such use within an R5 zoning district and must cease operations; and

Therefore it is Resolved that this appeal, which challenges an Order of Closure issued by DOB on December 3, 2009, is denied.

Adopted by the Board of Standards and Appeals, May 25, 2010.

57-10-A

APPLICANT – Eric Palatnik, P.C., for 517 53rd Street, Inc., owner.

SUBJECT – Application April 19, 2010 – Appeal seeking a determination that the owner has acquired a common law vested right to continue development commenced under the prior C4-3 zoning district. R6B zoning district.

PREMISES AFFECTED – 517 53rd Street, between Fifth Avenue and Sixth Avenue, Block 808, Lot 69, Borough of Brooklyn.

COMMUNITY BOARD #7BK

APPEARANCES –

For Applicant: Todd Dale.

ACTION OF THE BOARD – Appeal granted.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION –

WHEREAS, this is an appeal requesting a Board determination that the owner of the premises has obtained the right to complete the enlargement of a four-story mixed-use commercial/residential building under the common law doctrine of vested rights; and

WHEREAS, this application was brought subsequent to a companion application under BSA Cal. No. 303-09-BZY, which was a request to the Board for a finding that the owner of the premises has obtained a right to continue construction pursuant to ZR § 11-331; and

WHEREAS, the Board notes that separate applications were filed and that the applicant withdrew the application for the statutory vested rights case on May 12, 2010; the record is the same for both cases; and

WHEREAS, a public hearing was held on this appeal on April 27, 2010, after due notice by publication in *The City Record*, with a continued hearing on May 11, 2010, and then to decision on May 25, 2010; and

WHEREAS, the site was inspected by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, Commissioner Montanez, and Commissioner Ottley-Brown; and

WHEREAS, the applicant states that the subject site consists of a 3,006 sq. ft. lot located on the north side of 53rd Street, between Fifth Avenue and Sixth Avenue; and

WHEREAS, the applicant proposes to (1) convert the first floor and cellar from residential to commercial use, and (2) add 884 sq. ft. of commercial floor area to the rear of the first floor and an additional 884 sq. ft. of commercial floor space to the rear of the cellar of an existing four-story residential building, with an existing floor area of 7705.5 sq. ft.; and

WHEREAS, as part of the project, the applicant states that it is also converting the first floor of the existing building from residential use to commercial use; and

WHEREAS, the subject site was formerly located within a C4-3 zoning district; and

WHEREAS, the proposed mixed-use building complies with the former zoning district parameters; and

WHEREAS, however, on September 30, 2009 (hereinafter, the "Rezoning Date"), the City Council voted to adopt the Sunset Park Rezoning, which rezoned the site to R6B; and

WHEREAS, the proposed building does not comply with the R6B district parameters as to the commercial use, lot coverage, and rear yard; and

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

WHEREAS, the Board notes that Alteration Permit No. 310292108-01-AL (the "Permit"), which authorized the proposed enlargement of the building and conversion of the first floor from residential to commercial use pursuant to C4-3 zoning district regulations was issued on June 9, 2009; and

WHEREAS, by letter dated December 21, 2009, the Department of Buildings ("DOB") states that the Permit was lawfully issued, authorizing construction of the proposed Building prior to the Rezoning Date; and

WHEREAS, the Permit lapsed by operation of law on the Rezoning Date because the plans did not comply with the new R6B zoning district regulations and DOB determined that the required work had not been completed; and

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

WHEREAS, assuming that valid permits had been issued and that work proceeded under them, the Board notes that a common law vested right to continue construction generally exists where: (1) the owner has undertaken substantial construction; (2) the owner has made substantial expenditures; and (3) serious loss will result if the owner is denied the right to proceed under the prior zoning; and

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

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

WHEREAS, as to substantial construction, the applicant states that before the Rezoning Date, the owner had completed: 100 percent of the site preparation; 100 percent of the underpinning for the existing foundation; 100 percent of the demolition of existing interior partitions on the first floor; 100 percent of the front façade opening and structural work; 73 percent of the excavation for the rear addition; 73 percent of the plumbing and sewer work; 50 percent of the front stair work; 49 percent of the cement floor and tiling work; and 15 percent of the cement block work; and

WHEREAS, the applicant notes that work continued at the site until a Stop Work Order ("SWO") was issued on October 7, 2009, but states that only excavation work occurred at the site from the time of the Rezoning Date to the issuance of the SWO, and that all such work and associated costs has been excluded from the vested rights analysis; and

WHEREAS, the applicant submitted the following evidence to support its assertions regarding completed work: affidavits from the architect and project manager; and construction schedules; and

WHEREAS, the Board concludes that, based upon a comparison of the type and amount of work completed in the instant case with the type and amount of work found by New York State courts to support a positive vesting determination, a significant amount of work was performed at the site prior to the rezoning, and that said work was substantial enough to meet the guideposts established by case law; and

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

WHEREAS, the applicant states that prior to the Rezoning Date, the owner expended $101,049, including hard and soft costs and irrevocable commitments, out of approximately $170,000 budgeted for the entire enlargement; and

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

WHEREAS, the Board considers the amount of expenditures significant, both in and of itself for a project of this size, and when compared against the total development costs; and

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

WHEREAS, as to serious loss, the Board considers not only whether certain improvements and expenditures could not be recouped under the new zoning, but also considerations such as the diminution in income that would occur if the new zoning were imposed and the reduction in value between the proposed building and the building permitted under the new zoning; and

WHEREAS, the applicant contends that the loss of the $101,049 associated with pre-Rezoning Date project costs that would result if this appeal were denied is significant; and

WHEREAS, the applicant states that if required to build in accordance with the new zoning, the owner would have to restore the entire cellar and the apartments at the first floor level, at an estimated cost of $95,000; and

WHEREAS, the applicant further states that it would also lose approximately $30,000 in lost revenue from the proposed project; and

WHEREAS, the Board agrees that the need to redesign, the limitations of any conforming construction, and the $101,049 of actual expenditures and outstanding fees that could not be recouped constitute, in the aggregate, a serious economic loss, and that the supporting data submitted by the applicant supports this conclusion; and

WHEREAS, in sum, the Board has reviewed the representations as to the work performed, the expenditures made, the serious loss projected, and the supporting documentation for such representations, and agrees that the applicant has satisfactorily established that a vested right to complete construction had accrued to the owner of the premises as of the Rezoning Date.

Therefore it is Resolved that this appeal made pursuant to the common law doctrine of vested rights requesting a reinstatement of DOB Permit No. 310292108-01-AL, as well as all related permits for various work types, either already issued or necessary to complete construction and obtain a certificate of occupancy, is granted for two years from the date of this grant.

Adopted by the Board of Standards and Appeals, May 25, 2010.

217-09-A
APPLICANT – Marvin B. Mitzner, Esq., for 514-516 East 6th Street, owner.
SUBJECT – Application July 7, 2009 – An appeal seeking to vary the applicable provisions under the Multiple Dwelling Law as it applies to the enlargement of non-fireproof tenement buildings. R7-2 zoning district.
PREMISES AFFECTED – 514-516 East 6th Street, south side of East 6th Street, between Avenue A and B, Block 401, Lots 17 and 18, Borough of Manhattan.
COMMUNITY BOARD #3M
APPEARANCES –
For Applicant: Marvin B. Mitzner.
For Opposition: Harvey Epstein.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to July 27, 2010, at 10 A.M., for decision, hearing closed.

274-09-A
APPLICANT – Fire Department of New York, for Di Lorenzo Realty, Co, owner; 3920 Merritt Avenue, lessee.
SUBJECT – Application September 25, 2009 – Application to modify Certificate of Occupancy to require automatic wet sprinkler system throughout the entire building.
PREMISES AFFECTED – 3920 Merritt Avenue, aka 3927 Mulvey Avenue, 153' north of Merritt and East 233rd Street, Block 4972, Lot 12, Borough of Bronx.
COMMUNITY BOARD #12BX
APPEARANCES –
For Applicant: Anthony Scaduto.

ACTION OF THE BOARD – Laid over to June 22, 2010, at 10 A.M., for continued hearing.

283-09-BZY thru 286-09-BZY
APPLICANT – Rothkrug, Rothkrug & Spector LLP, for Alco Builders, Inc., owners.
SUBJECT – Application October 9, 2009 – Extension of time (§11-332) to complete construction of a minor development commenced under the prior R6 zoning district. R4-1 zoning district.
PREMISES AFFECTED – 90-18 176th Street, between Jamaica and 90th Avenues, Block 9811, Lot 60 (tent), Borough of Queens.
COMMUNITY BOARD #12Q
APPEARANCES –
For Applicant: Todd Dale.
For Opposition: Mark Isaak.

ACTION OF THE BOARD – Laid over to June 22, 2010, at 10 A.M. for continued hearing.

295-09-A & 296-09-A
APPLICANT – Rothkrug Rothkrug & Spector, LLP, for Karen Murphy, Trustee.
SUBJECT – Application October 20, 2009 – Proposed construction of one family home located within the bed of a mapped street (Bache Street) ,contrary to Section 35 of the General City Law. R3A Zoning District.
PREMISES AFFECTED – 81 and 83 Cortlandt Street, south side of Cortlandt Street, bed of Bache street, Block 1039, Lot 25 & 26, Borough of Staten Island.
COMMUNITY BOARD #2SI
APPEARANCES –
For Applicant: Todd Dale.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to June 15, 2010, at 10 A.M., for decision, hearing closed.

Jeff Mulligan, Executive Director

Adjourned: P.M.

REGULAR MEETING
TUESDAY AFTERNOON, MAY 25, 2010
1:30 P.M.

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

ZONING CALENDAR

214-09-BZ
CEQR #09-BSA-122X
APPLICANT – Rothkrug, Rothkrug & Spector, LLP, for LAL Astor Avenue Management Co., LLC, owner.
SUBJECT – Application June 29, 2009 – Special Permit (§73-125) to allow for a 9,996 sq ft ambulatory diagnostic or treatment center which exceeds the 1,500 sq ft maximum allowable floor area set forth in ZR §22-14. R4-1 zoning district.
PREMISES AFFECTED – 1464 Astor Avenue, south side of Astor Avenue, 100' east of intersection with Fenton Avenue, Block 4389, Lot 26, 45, Borough of Bronx.
COMMUNITY BOARD #11BX
APPEARANCES –
For Applicant: Eric Palatnik.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
Negative:.....0
THE RESOLUTION –

WHEREAS, the decision of the Bronx Borough Commissioner, dated June 1, 2009, acting on Department of Buildings Application No. 220004340, reads in pertinent part:

> "Proposed treatment health care facility exceeding 1,500 s.f. is contrary to ZR 22-14 and requires special permit from BSA as per ZR 22-21, limited to a maximum of 10,000 square feet of floor area;" and

WHEREAS, this is an application under ZR §§ 73-125 and 73-03, to permit, on a site within an R4-1 zoning district, the construction of a three-story building, with a floor area of 9,989 sq. ft., to be occupied by an ambulatory diagnostic/treatment health care facility (Use Group 4) with 20 parking spaces, contrary to ZR § 22-14; and

WHEREAS, a public hearing was held on this application on September 22, 2009 after due notice by publication in *The City Record*, with continued hearings on November 10, 2009, January 12, 2010,February 9, 2010 and April 20, 2010, and then to decision on May 25, 2010; and

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

WHEREAS, Community Board 11, Bronx, recommends disapproval of this application; and

WHEREAS, several elected officials provided written and/or oral testimony in opposition to this application, including: Borough President Ruben Diaz, Jr., City Council Member James Vacca, and State Senator Jeffrey D. Klein; and

WHEREAS, a local civic organization and certain neighborhood residents also provided written and oral testimony in opposition to this application; and

WHEREAS, collectively, the parties who provided testimony in opposition to the proposal are the "Opposition;" and

WHEREAS, specifically, the Opposition raised concerns regarding: (1) the incompatibility of the proposed facility with the surrounding neighborhood; (2) increased traffic; (3) insufficient parking; (4) the lack of need for the facility and the absence of a specified operator; (5) whether the proposal fits within the legislative intent of the special permit; and (6) the effect of the proposed facility on the adjacent fire station; and

WHEREAS, the Fire Department also provided written and oral testimony raising concerns that the proposed construction would impact renovations contemplated for the adjacent fire station, and that the traffic generated by the proposed facility would interfere with fire equipment's access and egress from its site, thus delaying the fire station's response time; and

WHEREAS, the subject site is located on the south side of Astor Avenue, between Fenton Avenue and Eastchester Road, within an R4-1 zoning district; and

WHEREAS, the site has a lot area of 18,103 sq. ft. and is currently occupied by a two-story home with a floor area of 2,438 sq. ft., which is proposed to be demolished; and

WHEREAS, the applicant proposes to construct a three-story ambulatory diagnostic/treatment health care facility with a total floor area of 9,989 sq. ft. (0.55 FAR); and

WHEREAS, the applicant originally proposed a two-story building with a floor area of 9,996 sq. ft. (0.55 FAR), a lot coverage of 29 percent, a depth of 154'-8", and a wall height of 21'-6"; and

WHEREAS, in response to concerns raised by the Opposition and at the direction of the Board, the applicant revised its proposal to provide a three-story building with a floor area of 9,989 sq. ft. (0.55 FAR), a lot coverage of 18 percent, a depth of 107'-8", and a wall height of 30'-0", in order to provide more open space on the lot; and

WHEREAS, pursuant to ZR § 25-31, one off-street accessory parking space is required for every 500 sq. ft. of floor area; thus, 20 parking spaces will be provided for the proposed 9,989 sq. ft. facility; and

WHEREAS, the applicant notes that a 1,500 sq. ft. ambulatory diagnostic/treatment health care facility use would be permitted as-of-right in the subject zoning district, but since it proposes a facility with a greater floor area, it seeks a special permit pursuant to ZR § 73-125; and

WHEREAS, pursuant to ZR § 73-125, the Board may grant a request to permit an increase in the floor area of an ambulatory diagnostic/treatment health care facility use from 1,500 sq. ft. up to a maximum of 10,000 sq. ft. on the site, provided that the Board finds that the amount of open area and its distribution on the zoning lot conforms to standards appropriate to the character of the neighborhood; and

WHEREAS, the Board notes that other than the increase in floor area beyond 1,500 sq. ft. authorized by the special permit, the ambulatory diagnostic/treatment health care facility must comply with all zoning parameters of the underlying district; and

WHEREAS, the applicant states that the facility will have a floor area of 9,989 sq. ft., which the Board notes is less than the maximum of 10,000 sq. ft. permitted by the special permit; and

WHEREAS, the applicant further states that the proposed bulk, including a 30'-0" height, complies with the underlying zoning district regulations; and

WHEREAS, the applicant represents that the lot coverage for the proposed building is approximately 18 percent, which is significantly lower than the maximum permitted lot coverage of 55 percent, leaving approximately 82 percent of the zoning lot as open space (including landscaping and parking areas); and

WHEREAS, the applicant notes that, at the direction of the Board, it re-designed the building such that the majority of the construction is proposed to be located as close to Astor Avenue as possible, with the entire rear yard, to a depth of more than 100 feet, being retained as open area (including landscaping and parking areas); and

WHEREAS, accordingly, the Board finds that the bulk of the building, the amount of open area and its distribution on the zoning lot conform to standards appropriate to the character of the neighborhood; and

WHEREAS, the Opposition raised concerns that the proposed facility does not fit within the context of the surrounding neighborhood, specifically with regard to the size of the building and the amount of open space provided; and

WHEREAS, as to the size of the building, the applicant notes that the proposal's bulk complies with zoning district regulations, and that the site's lot area would allow for a residential building or another type of community facility building with approximately 36,000 sq. ft. of floor area; and

WHEREAS, as to the open space on the site, the applicant submitted an open area analysis of the surrounding area, which reflects that the lots located on the subject block have an average open area of 58.5 percent, compared to the 82 percent of open area located on the subject site; and

WHEREAS, as noted above, the applicant also revised the plans at the Board's direction to decrease the depth of the building from 154'-8" to 107'-8", thereby decreasing the lot coverage of the building from 29 percent to 18 percent and increasing the open space on the site; and

WHEREAS, the Board notes that the applicant also revised the plans to provide a façade and roof for the building that are more in character with the surrounding residential buildings; and

WHEREAS, the Opposition also raised concerns about the amount of traffic that will be generated by the proposed facility, and whether there is sufficient parking on the site to accommodate the use; and

WHEREAS, in response, the applicant provided a traffic analysis based on a similar medical facility located in Queens, which indicates that a total of approximately 108 vehicles (including both patients and employees) are expected to travel to the proposed site each day, with no more than 35 vehicle trips expected during any peak hour, and with a peak parking accumulation of 17 cars; and

WHEREAS, the applicant also submitted a traffic analysis based on the standards set forth in the Institute of Transportation Engineers ("ITE") guidebook, which reflects that for the proposed facility a maximum of 180 cars can be expected to travel to the site per day, with no more than 37 vehicle trips during any peak hour, and with a peak parking accumulation of 20 cars; and

WHEREAS, the applicant represents that the ITE standards represent the most conservative scenario, as it assumes 100 percent travel by vehicle, with a vehicle occupancy of only one person per automobile; and

WHEREAS, the applicant notes that under either scenario it analyzed, the proposed facility would not generate more than 50 vehicle trips during any peak hour time period, and therefore the proposal is not expected to result in significant adverse impacts related to traffic or parking pursuant to the CEQR Technical Manual; and

WHEREAS, the applicant further notes that the proposal does not exceed a peak parking accumulation of 20 cars under either scenario, and that 20 parking spaces are proposed for the site, in accordance with ZR § 25-31; and

WHEREAS, the applicant states that while additional parking could have been provided at the rear of the building, the current proposal reflects an effort to balance the Opposition's requests that it both provide sufficient parking and also maximize the amount of landscaping provided at the rear; and

WHEREAS, during the course of the hearing process, the applicant revised its plans to provide drop-off areas at the front and rear of the building to insure that there would not be any traffic congestion in front of the building, with the drop-off area in the rear able to accommodate vehicles that exceed the size of passenger vehicles; and

WHEREAS, as to the Opposition's concerns that the applicant has not specified any particular tenants or types of medical offices that will be located in the proposed facility and that there is no need for another medical facility in the surrounding area, the Board notes that concerns about business-related decisions are not part of the analysis under this special permit; and

WHEREAS, the Opposition also argues that the proposed facility is not within an area the City Planning Commission originally intended to permit ambulatory diagnostic/treatment health care facilities of such a size

when it created the subject special permit; and

WHEREAS, in response, the applicant notes that the provisions and findings of the subject special permit section are clear and unambiguous and they do not prohibit the location of the proposed facility at the subject site; therefore there is no cause to resort to the legislative intent; and

WHEREAS, the Opposition and the Fire Department also raised concerns that the construction of the proposed facility will: (1) cause flooding and damage to the adjacent fire station; (2) interfere with a pending public improvement project because it will prevent the fire station from storing its fire engine in a cage located on the street while the station is being renovated; (3) create traffic conditions that will delay the fire station's response time; and (4) replace the existing fire zone with a curb cut to access the parking lot; and

WHEREAS, in response, the applicant states that: (1) all construction is subject to review and approval by the Department of Buildings and the Department of Environmental Protection, the agencies responsible for construction safety and sanitary and storm water drainage; (2) the proposed construction will not interfere with the pending fire station renovation because the temporary placement of a cage on the street for the storage of the fire engine is not proposed to be located on the applicant's property and therefore it will not be affected by the proposed construction; (3) as noted above, the applicant has submitted traffic analyses and has revised the plans to include drop-off areas to insure that there will not be any traffic congestion at the front of the subject building; and (4) the installation of the curb cut and relocation of the fire hydrant does not create a non-compliance and will not affect the functionality of the fire zone, as it will insure that no vehicles park in that area; and

WHEREAS, the applicant states that in order to provide a turnaround with a 50'-0" diameter to accommodate larger vehicles the site requires the relocation of the curb cuts to the lot lines of the site; thus, the applicant revised the plans to reflect that the curb cuts will be relocated to the lot lines; and

WHEREAS, the Board directed the applicant to confirm whether the proposal complies with all regulations associated with curb cuts within fire zones and adjacency to a fire station; and

WHEREAS, in response, the applicant states that the proposal does not conflict with any fire access related regulations; and

WHEREAS, the applicant also states that it intends to relocate the existing fire hydrant such that it does not interfere with the location of the proposed curb cuts; and

WHEREAS, the Opposition submitted a letter signed by 30 residents in the surrounding area, requesting that a number of conditions be incorporated into the grant should the Board approve the special permit; and

WHEREAS, specifically, the Opposition requests conditions related to the use and operation of the parking lot, the use and operation of the proposed ambulatory diagnostic/treatment health care facility, and the construction of the proposed facility; and

WHEREAS, in response to the Opposition's request, the applicant has agreed to the following primary conditions: (1) the installation of a wood fence around the parking lot to a height of 6'-0"; (2) the installation of concrete parking stops to prevent cars from entering the surrounding yards; (3) valet parking will be prohibited; (4) car lifts will be prohibited; (5) the installation of "No Idling" signs; (6) that the parking lot will be gated and secured after business hours; (7) the hours of operation shall be 8:00 a.m. to 8:00 p.m. on Monday through Friday, 9:00 a.m. to 2:00 p.m. on Saturday, and closed on Sunday; (8) the building will be kept free of graffiti at all times; (9) the fencing and landscaping on the site will be maintained at all times; (10) any underground oil tanks and contaminated soil will be removed in accordance with federal, state and local regulations; and (11) all construction will be coordinated with the adjacent fire station, Engine 97; and

WHEREAS, the Board notes that it will also require the installation of a 12'-0" by 4'-0" planted median in the center of the parking lot, as requested by the Opposition; and

WHEREAS, the Opposition also requested conditions stipulating that: (1) the term of the special permit be limited to five years; (2) no more than 14 employees may be present at the proposed facility at one time; (3) no building permit be issued that includes an occupancy classification of H1, H2, H3 or H4; and (4) the site not be used as a drug treatment center; and the Opposition also expressed concern regarding the creation, storage and disposal of hazardous materials; and

WHEREAS, as to a limited term, the Board notes that ZR § 73-125 does not place a term on the special permit authorized under that section, and that the subject proposal contemplates the construction of an entirely new building for the express use as an ambulatory diagnostic/treatment health care facility, which represents a significant investment; and

WHEREAS, the Board notes that pursuant to ZR § 73-04, it has the authority to prescribe conditions and safeguards to the grant of a special permit, and the applicant's failure to comply with such conditions constitute the basis for the revocation of the grant; and

WHEREAS, based upon the above, the Board declines to adopt a condition limiting the term of the special permit; and

WHEREAS, as to the number of employees, the Board declines to adopt such a condition, noting that the number of parking spaces provided at the site complies with the parking requirements set forth in the Zoning Resolution, which takes employee usage of the site into account, and that the traffic analyses submitted by the applicant were conservative and based on both employee and patient trips to the proposed facility, which indicated that the site provides sufficient parking; and

WHEREAS, as to the use classification, the applicant agreed not to have any use on the site with an occupancy classification of H1, H2, H3 or H4, and notes that the instant

proposal is for a medical facility, which generally has an occupancy classification of "B," as opposed to "H"; and

WHEREAS, as to prohibiting a drug treatment facility at the site, the Board notes that the Opposition failed to provide any rationale for restricting the use; and

WHEREAS, the Board further notes that use of the site as a drug treatment facility is permitted as-of-right within the zoning district to a limit of 1,500 sq. ft., and is otherwise permitted by the subject special permit; and

WHEREAS, as to waste disposal, the applicant notes that all medical waste generated at the site will be stored and disposed of in accordance with relevant regulations; and

WHEREAS, based upon the above, the Board has determined that the evidence in the record supports the requisite findings pursuant to ZR § 73-125; and

WHEREAS, the Board further finds that the subject use will not alter the essential character of the surrounding neighborhood nor will it impair the future use and development of the surrounding area; and

WHEREAS, as noted above, the applicant will coordinate the proposed construction with the adjacent fire station; and

WHEREAS, accordingly, the Board finds that the proposal will not interfere with the renovation of the adjacent fire station, and will otherwise 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 § 73-03; and

WHEREAS, the project is classified as Unlisted pursuant to 6 NYCRR Part 617.2 (ak); 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. 09BSA122X, dated June 30, 2009; and

WHEREAS, the EAS documents that the operation of the facility 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, a trip generation analysis dated April 5, 2010, determined that the proposed action would generate less than fifty new vehicle trips in any peak hour (below the CEQR Technical Manual threshold for conducting a detailed analysis of traffic impacts) and therefore the proposed action would not have any potentially significant adverse impacts related to traffic and parking; and

WHEREAS, the Board has determined that the operation of the facility 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 ZR §§ 73-125 and 73-03, to permit, on a site within an R4-1 zoning district, the construction of a three-story building to be occupied by an ambulatory diagnostic/treatment health care facility (Use Group 4) with 20 parking spaces, contrary to ZR § 22-14; *on condition* that all work shall substantially conform to drawings filed with this application marked "Received May 6, 2010" – three (3) sheets and "Received May 21, 2010" – three (3) sheets; and *on further condition*:

THAT the parameters of the building shall be as follows: a maximum floor area of 9,989 sq. ft. (0.55 FAR); a maximum lot coverage of 18 percent; a maximum wall height of 30'-0"; a maximum height of 35'-7" at the ridge; and 20 parking spaces, as per the approved plans;

THAT there shall be no valet parking on the site;

THAT there shall be no car lifts on the site;

THAT the site shall be gated and secured after business hours, in accordance with the BSA-approved plans;

THAT the hours of operation shall be limited to 8:00 a.m. to 8:00 p.m. Monday through Friday; 9:00 a.m. to 2:00 p.m. on Saturday; and closed on Sunday;

THAT all landscaping and fencing shall be provided and maintained in accordance with the approved plans;

THAT the site shall be maintained free of debris and graffiti;

THAT the facility operations, including waste storage and disposal, shall be in accordance with the Zoning Resolution, Building Code, and all other relevant regulations for the proposed use;

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

THAT any underground oil tanks or contaminated soil shall be removed in accordance with federal, state, and local regulations;

THAT construction at the site shall be coordinated with the adjacent fire station located at 1454 Astor Avenue;

THAT a storm water/sanitary sewer shall be as approved by DEP;

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

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

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

THAT the approved plans 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, May 25, 2010.

331-09-BZ
CEQR #10-BSA-036M
APPLICANT – Slater & Beckerman, LLP, for 141 East 45th Street, LLC, owner; R. H. Massage Services, P.C., lessee.
SUBJECT – Application December 22, 2009 – Special Permit (§73-36) to legalize the operation of a physical culture establishment (*River View Spa*) located on the second and third floors in an existing three-story building. C5-2.5 zoning district.
PREMISES AFFECTED – 141 East 45th Street, north side of East 4th Street, between Lexington Avenue and Third Avenue, Block 1300, Lot 26, Borough of Manhattan.
COMMUNITY BOARD #6M
APPEARANCES –
For Applicant: Neil Weisbard.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
Negative:.....0
THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated December 15, 2009, acting on Department of Buildings Application No. 120211476, reads in pertinent part:

> "Physical culture or health establishment is not permitted as of right in C5-2.5 zoning district.
> Refer to Board of Standards and Appeals for special permit pursuant to ZR 73-36;" and

WHEREAS, this is an application under ZR §§ 73-36 and 73-03, to permit, on a site in a C5-2.5 zoning district within the Special Midtown District, the legalization of a physical culture establishment ("PCE") on the second and third floors of a three-story commercial building, contrary to ZR § 32-10; and

WHEREAS, a public hearing was held on this application on April 20, 2010 after due notice by publication in *The City Record*, and then to decision on May 25, 2010; and

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

WHEREAS, Community Board 6, Manhattan, states that it has no objection to this application; and

WHEREAS, the subject site is located on the north side of East 45th Street, between Lexington Avenue and Third Avenue, in a C5-2.5 zoning district within the Special Midtown District; and

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

WHEREAS, the PCE occupies a total floor area of 1,932 sq. ft. on the second and third floors; and

WHEREAS, the PCE is operated as River View Spa; and

WHEREAS, the proposed hours of operation are 10:00 a.m. to 10:00 p.m., daily; and

WHEREAS, the applicant represents that the services at the PCE include facilities for the practice of massage; and

WHEREAS, at hearing, the Board questioned whether the applicant was in compliance with a Fire Department violation order dated October 9, 2009, which required that the applicant: (1) provide a metal receptacle for each cubicle room on the second and third floors; (2) provide portable fire extinguishers on both the second and third floors; (3) properly hang the fire extinguishers between 2'-6" and 4'-0" above the floor; and (4) remove the exit sign showing the door leading to the third floor as an exit; and

WHEREAS, in response, the applicant submitted photographs reflecting its compliance with the Fire Department requirements and the Fire Department has no further objections; and

WHEREAS, the applicant represents that the proposed PCE meets the requirements in ZR § 81-13 for a special permit use in the Special Midtown District; and

WHEREAS, specifically, the applicant states that the proposed PCE use is consistent with other retail uses within the Special Midtown District and will provide a desirable amenity to the neighborhood; and

WHEREAS, as a result, the applicant states that the subject PCE use will strengthen the business core of Midtown Manhattan by improving working and living environments and will promote a desirable use of land and building development in accordance with the District Plan for Midtown wherein the value of land is conserved and tax revenue is protected; and

WHEREAS, accordingly, the Board finds that the proposed special permit use is consistent with the purposes and provisions of ZR § 81-00; 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 Board notes that the PCE has been in

operation since April 1, 2008, without a special permit; and

WHEREAS, accordingly, the Board has determined that the term of the grant shall be reduced for the period of time between April 1, 2008 and the date of this grant; and

WHEREAS, the project is classified as an Unlisted action pursuant to 6 NYCRR Part 17.2; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement, CEQR No. 10BSA036M, dated December 12, 2009; and

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

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

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

Therefore it is Resolved that the Board of Standards and Appeals issues a 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 in a C5-2.5 zoning district, within the Special Midtown District, the legalization of a physical culture establishment on the second and third floors of an existing three-story commercial building, contrary to ZR § 32-10; *on condition* that all work shall substantially conform to drawings filed with this application marked "Received May 11, 2010" - Seven (7) sheets; and *on further condition*:

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

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

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

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

THAT a new Certificate of Occupancy shall be obtained within six months of the date of this grant, by November 25, 2010;

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, May 25, 2010.

20-10-BZ
CEQR #10-BSA-046M

APPLICANT – Francis R. Angelino, Esq., for Lerad Company, owner; Soul Cycle East 83rd Street, LLC, lessee.
SUBJECT – Application February 8, 2010 – Special Permit (§73-36) to allow the legalization of an existing physical culture establishment (*Soul Cycle*) on the ground floor of an existing six-story building. C1-9 zoning district.
PREMISES AFFECTED – 1470 Third Avenue, a/k/a 171-173 East 83rd Street, northwest corner of East 83rd Street and Third Avenue, Block 1512, Lot 33, Borough of Manhattan.
COMMUNITY BOARD #8M

APPEARANCES –
For Applicant: Francis R. Angelino.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated January 13, 2010, acting on Department of Buildings Application No. 120178253, reads in pertinent part:

> "Proposed 'physical culture establishment' is not permitted as-of-right in C1-9 zoning district. This use is contrary to Section 32-10 ZR. Requires a special permit from the Board of Standards and Appeals;" and

WHEREAS, this is an application under ZR §§ 73-36 and 73-03, to permit, on a site within a C1-9 zoning district, the legalization of a physical culture establishment ("PCE") on the first floor of a six-story mixed-use commercial/residential building, contrary to ZR § 32-10; and

WHEREAS, a public hearing was held on this application on April 13, 2010 after due notice by publication in *The City Record*, with a continued hearing on May 11, 2010, and then to decision on May 25, 2010; and

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

WHEREAS, Community Board 8, Manhattan,

recommends approval of this application, but requested a review of the legality of the ground floor store frontage and signage; and

WHEREAS, the subject site is located on the northwest corner of East 83rd Street and Third Avenue, within a C1-9 zoning district; and

WHEREAS, the site is occupied by a six-story mixed-use commercial/residential building; and

WHEREAS, the PCE occupies a total floor area of approximately 1,480 sq. ft. on a portion of the first floor of the building; and

WHEREAS, the PCE is operated as Soul Cycle; and

WHEREAS, the proposed hours of operation are: Monday through Friday, from 6:00 a.m. to 9:00 p.m.; and Saturday and Sunday, from 7:00 a.m. to 7:00 p.m.; and

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

WHEREAS, at hearing, in response to the Community Board's concerns, the Board questioned whether the signage at the site, particularly the storefront windows, are in compliance with C1 district signage regulations and whether the storefront had been constructed pursuant to the required approvals; and

WHEREAS, in response, the applicant submitted a signage analysis indicating that the signage at the site complies with C1 district regulations, and a Department of Buildings work permit which included the installation of the new storefront; 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 Board notes that the PCE has been in operation since September 25, 2009, without a special permit; and

WHEREAS, accordingly, the Board has determined that the term of the grant shall be reduced for the period of time between September 25, 2009 and the date of this grant; and

WHEREAS, the project is classified as an Unlisted action pursuant to 6 NYCRR Part 17.2; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement, CEQR No.10BSA046M, dated February 3, 2010; and

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

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

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

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617 and § 6-07(b) of the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR §§ 73-36 and 73-03, to permit, on a site within a C1-9 zoning district, the legalization of a physical culture establishment on the first floor of an existing six-story commercial/residential building, contrary to ZR § 32-10; *on condition* that all work shall substantially conform to drawings filed with this application marked "Received April 29, 2010" - One (1) sheet and "Received May 5, 2010" - One (1) sheet; and *on further condition*:

THAT the term of this grant shall expire on September 25, 2019;

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 signage shall comply with C1 district regulations;

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

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

THAT 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, May 25, 2010.

160-08-BZ

APPLICANT – Dominick Salvati and Son Architects, for HJC Holding Corporation, owner.

SUBJECT – Application June 11, 2008 – Variance (§72-21) to permit the legalization of commercial storage of motor vehicles/buses (UG 16C) with accessory fuel storage and motor vehicles sales and repair (UG 16B), which is contrary to §22-00. R4 zoning district.

PREMISES AFFECTED – 651-671 Fountain Avenue, Bounded by Fountain, Stanley, Euclid and Wortman Avenues, Block 4527, Lot 61, 64, 67, 74-78, 80, 82, Borough of Brooklyn.

COMMUNITY BOARD #5BK

APPEARANCES –

For Applicant: Peter Hirschman, Frank Angelino and Jack Freeman.

ACTION OF THE BOARD – Laid over to June 15, 2010, at 1:30 P.M., for continued hearing.

28-09-BZ

APPLICANT – Moshe M. Friedman, P.E., for 133 Equity Corp., owner.

SUBJECT – Application February 17, 2009 – Variance (§72-21) to permit a four-story residential building on a vacant lot, contrary to use regulations (§42-10). M1-1 zoning district.

PREMISES AFFECTED – 133 Taaffe Place, east side of Taaffe Place, 142'-2.5" north of intersection of Taaffe Place and Myrtle Avenue, Block 1897, Lot 4, Borough of Brooklyn.

COMMUNITY BOARD #3BK

APPEARANCES –

For Applicant: Moshe M. Friedman.

THE VOTE TO CLOSE HEARING –

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

Negative:.....0

ACTION OF THE BOARD – Laid over to June 8, 2010, at 1:30 P.M., for decision, hearing closed.

31-09-BZ

APPLICANT – Eric Palatnik, PC, for R & R Auto Repair & Collision, owner.

SUBJECT – Application February 27, 2009 – Special Permit (§11-411, §11-412, §11-413) for re-instatement of previous variance, which expired on November 12, 1990; amendment for a change of use from a gasoline service station (UG16b) to automotive repair establishment and automotive sales (UG16b); enlargement of existing one story structure; and Waiver of the Rules. C2-2/R3-2 zoning district.

PREMISES AFFECTED – 117-04 Sutphin Boulevard, southwest corner of Foch Boulevard, Block 1203, Lot 13, Borough of Queens.

COMMUNITY BOARD #12Q

APPEARANCES –

For Applicant: Eric Palatnik.

ACTION OF THE BOARD – Laid over to June 22, 2010 at 1:30 P.M., for adjourned hearing.

162-09-BZ

APPLICANT – Sheldon Lobel, P.C., for Steinway 30-33, LLC, owner; Steinway Fitness Group, LLC d/b/a Planet Fitness, lessee.

SUBJECT – Application April 27, 2009 – Special Permit (§73-36) to allow the legalization of a physical culture establishment (*Planet Fitness*) in the cellar, first, and second floors in an existing two-story building; Special Permit (§73-52) to extend the C4-2A zoning district regulations 25 feet into the adjacent R5 zoning district. C4-2A/R5 zoning districts.

PREMISES AFFECTED – 30-33 Steinway Street, east side of Steinway Street, south of 30th Avenue, Block 680, Lot 32, Borough of Queens.

COMMUNITY BOARD #1Q

APPEARANCES –

For Applicant: Elizabeth Safain.

THE VOTE TO CLOSE HEARING –

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

Negative:.....0

ACTION OF THE BOARD – Laid over to June 8, 2010, at 1:30 P.M., for decision, hearing closed.

173-09-BZ

APPLICANT – Law Offices of Howard Goldman LLC, for 839-45 Realty LLC, owner; 839 Broadway Realty LLC, lessee.

SUBJECT – Application May 21, 2009 – Variance (§72-21) to allow a seven-story mixed use building, contrary to use regulations (§32-00, 42-00). C8-2/M1-1 zoning districts.

PREMISES AFFECTED – 845 Broadway, between Locust and Park Streets, Block 3134, Lot 5, 6, 10, 11, Borough of Brooklyn.

COMMUNITY BOARD #4BK

APPEARANCES –

For Applicant: Howard Goldman.

THE VOTE TO CLOSE HEARING –

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

Negative:.....0

ACTION OF THE BOARD – Laid over to June 22, 2010, at 1:30 P.M., for decision, hearing closed.

271-09-BZ
APPLICANT – Sheldon Lobel, P.C., for 132-40 Metropolitan Realty, LLC, owner; Jamaica Fitness Group, LLC d/b/a Planet Fitness, lessee.
SUBJECT – Application September 21, 2009 – Special Permit (§73-36) to legalize the operation of an existing physical culture establishment (*Planet Fitness*) on the first, second, and third floors of an existing three-story building. C2-3 zoning district.
PREMISES AFFECTED – 132-40 Metropolitan Avenue, between Metropolitan Avenue and Jamaica Avenue, approximately 300 feet east of 132nd Street. Block 9284, Lot 19, Borough of Queens.
COMMUNITY BOARD #9Q
APPEARANCES –
For Applicant: Elizabeth Safian.

ACTION OF THE BOARD – Laid over to June 15, 2010, at 1:30 P.M., for continued hearing.

282-09-BZ
APPLICANT – Steven Williams, P.E., for KC&V Realty, LLC, owner; Richard Ortiz, lessee.
SUBJECT – Application October 7, 2009 – Special Permit (§73-36) to legalize the operation of a physical culture establishment (*Ritchie's Gym*) on the third floor of a four-story commercial building.C4-3 zoning district.
PREMISES AFFECTED – 54-19 Myrtle Avenue, northeast corner of Myrtle Avenue, intersection of Palmetto Street and Myrtle Avenue, Block 3445, Lot 9, Borough of Queens.
COMMUNITY BOARD #5Q
APPEARANCES –
For Applicant: Steven Williams and Richard Ortiz.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to June 8, 2010, at 1:30 P.M., for decision, hearing closed.

325-09-BZ
APPLICANT – Sheldon Lobel, P.C., for Congregation Yetev Lev 11th Avenue, owner.
SUBJECT – Application December 7, 2009 – Variance (§72-21) to permit the proposed four-story and mezzanine synagogue (*Congregation Yetev Lev*), contrary to lot coverage (§24-11), rear yard (§24-36) and initial setback of front wall (§24-522). R6 zoning district.
PREMISES AFFECTED – 1364 & 1366 52nd street, south side of 52nd Street, 100' west of 14th Avenue, Block 5663, Lot 31 & 33, Borough of Brooklyn.
COMMUNITY BOARD #12BK
APPEARANCES –
For Applicant: Richard Lobel.

ACTION OF THE BOARD – Laid over to June 15, 2010 at 1:30 P.M., for adjourned hearing.

333-09-BZ
APPLICANT – Moshe M. Friedman, for Cong Yeshiva Beis Chaya Mushka, Inc., owner.
SUBJECT – Application December 23, 2009 – Variance (§72-21) to permit the vertical extension of an existing religious school (*Congregation Yeshiva Beis Chaya Mushika*), contrary to floor area, lot coverage, height, sky exposure plane, front yard, and side yard regulations (§§24-11, 24-521, 24-34, and 24-35). R4 zoning district.
PREMISES AFFECTED –360 Troy Avenue aka 348-350 Troy Avenue aka 1505-1513 Carroll Street, northwest corner of Troy Avenue and Carroll Street, Block 1406, Lot 44, Borough of Brooklyn.
COMMUNITY BOARD # 9BK
APPEARANCES –
For Applicant: Moshe M. Friedman, Rabbi Levi Plotkin and Jean Suayna Cuarter.

ACTION OF THE BOARD – Laid over to June 15, 2010, at 1:30 P.M., for continued hearing.

9-10-BZ
APPLICANT – Eric Palatnik, P.C., for Ching Kuo Chiang, owner.
SUBJECT – Application January 22, 2010 – Variance (§72-21) to allow a restaurant use in an existing building, contrary to §22-00. R1-2 zoning district.
PREMISES AFFECTED – 231-10 Northern Boulevard, Northwest corner of 232nd Street, Block 8164, Lot 30, Borough of Queens.
COMMUNITY BOARD #11Q
APPEARANCES –
For Applicant: Eric Palatnik, Hackjong Choi and Henry Salmon.
For Opposition: David Brodie, Howard Jackson, Michael Simon and Eliott Socci.

ACTION OF THE BOARD – Laid over to June 22, 2010, at 1:30 P.M., for continued hearing.

21-10-BZ
APPLICANT – Richard Lobel, P.C., for Aquila Realty Company, Incorporated, owner.
SUBJECT – Application February 12, 2010 – Special Permit (§73-243) to legalize an eating and drinking establishment with a drive-through. C1-2/R4A zoning district.
PREMISES AFFECTED – 2801 Roelbling Avenue aka 1590 Hutchison River Parkway, southeast corner of Roebling Avenue and Hutchinson River Parkway, Block 5386, Lot 1, Borough of Bronx.
COMMUNITY BOARD #10BX
APPEARANCES –
For Applicant: Richard Lobel.

ACTION OF THE BOARD – Laid over to June 15, 2010, at 1:30 P.M., for continued hearing.

30-10-BZ
APPLICANT – Law Office of Fredrick A. Becker, for Susan Shalitzky, owner.
SUBJECT – Application March 8, 2010 – Special Permit (§73-622) for the enlargement of an existing single family home, contrary to open space and floor area (§23-141) and less than the required rear yard (§23-47). R-2 zoning district.
PREMISES AFFECTED – 1384 East 22nd Street, west side of East 22nd Street, between Avenues M and N, Block 7657, Lot 56, Borough of Brooklyn.
COMMUNITY BOARD #14BK
APPEARANCES –
For Applicant: Lyra Altman.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to June 8, 2010, at 1:30 P.M., for decision, hearing closed.

41-10-BZ
APPLICANT – Kramer Levin Naftalis & Frankel LLP, for NYU Hospital Center, owner; New York University, lessee.
SUBJECT – Application March 24, 2010 – Variance pursuant (§72-21) to allow for the enlargement of a community facility (*NYU Langone Medical Center*) contrary to rear yard (§24-36) and signage regulations (§§22-321, 22-331, 22-342). R8 zoning district.
PREMISES AFFECTED – 522-566/596-600 First Avenue aka 400-424 East 34th Street and 423-437 East 30th Street, East 34th Street; Franklin D. Roosevelt; East 30th Street and First Avenue, Block 962, Lot 80, 108 & 1001-1107, Borough of Manhattan.
COMMUNITY BOARD #6M
APPEARANCES –
For Applicant: Elis Wagner, Mark Lippi and Anne Harakawa.
THE VOTE TO CLOSE HEARING –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5
Negative:.....0

ACTION OF THE BOARD – Laid over to June 22, 2010, at 1:30 P.M., for decision, hearing closed.

Jeff Mulligan, Executive Director

Adjourned: P.M.