

61-10-BZ

CEQR #10-BSA-068M

APPLICANT – James Chin & Associates, LLC, for Norman Wong, owner.

SUBJECT – Application April 26, 2010 – Variance (§72-21) to legalize an existing building contrary to height (§23-692), lot coverage (§23-245), rear yard (§23-532) and floor area (§23-145) regulations. R7-2/C1-5 zoning district.

PREMISES AFFECTED – 183 East Broadway, 43.5’ frontage on Henry Street and 26.1 frontage on East Broadway, Block 284, Lot 19, Borough of Manhattan.

COMMUNITY BOARD #3M

APPEARANCES –

For Applicant: James Chin

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Superintendent, dated May 17, 2011, acting on Department of Buildings Application No. 104314939, reads, in pertinent part:

Proposed building exceeds the maximum building height permitted in R7-2 zoning district as per ZR 23-633 & 23-692

Proposed lot coverage does not comply with ZR 23-145 (max. lot coverage). Maximum lot coverage permitted in a R7-2 is 65%.

Under this application the proposed lot coverage is 67.7%

Proposed rear yard (through lot) does not comply with the requirement of section ZR 23-532(a),(b),(c); ZR 23-543(a); ZR 23-47; and ZR 24-393(a); and

WHEREAS, this is an application under ZR § 72-21, to permit, partially within a C1-5 (R7-2) zoning district and partially within an R7-2 zoning district, the construction of a six-story mixed-use building with ground floor retail and community facility use and residential above, which does not comply with the underlying zoning regulations for height, lot coverage, and rear yard, contrary to ZR §§ 23-633, 23-692, 23-145, 23-532, 23-543, 23-47 and 24-393; and

WHEREAS, a public hearing was held on this application on March 8, 2011, after due notice by publication in the *City Record*, with continued hearings on May 3, 2011 and June 21, 2011, and then to decision on July 19, 2011; 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 3, Manhattan, recommends approval of this application; and

WHEREAS, certain members of the community provided testimony in support of this application; and

WHEREAS, certain members of the community provided testimony in opposition to this application, citing concerns with the impact of the proposed building on the surrounding neighborhood character; and

WHEREAS, the site is located on an irregular bottleneck-shaped lot with 43’-10” of frontage on Henry Street, 26’-1” of frontage on East Broadway, a depth of 175 feet, and a total lot area of 5,873 sq. ft., partially within a C1-5 (R7-2) zoning district and partially within an R7-2 zoning district; and

WHEREAS, the portion of the lot bordering on East Broadway, with a width of 26’-1”, is a through lot that extends 175 feet from East Broadway to Henry Street; and

WHEREAS, however, two portions of the lot qualify as interior lots: (1) the 4’-9” wide by 75’-0” deep portion of the lot bordering the west side of Henry Street; and (2) the 12’-8” wide by 75’-0” deep portion of the lot bordering the east side of Henry Street; and

WHEREAS, the site was formerly occupied by an 81-year-old mixed-use residential/ commercial building which ranged in height from one-story to five stories with a legal non-complying rear yard of 9’-11” on the Henry Street portion of the building (the “Pre-Existing Building”), which was demolished in anticipation of construction on the site; and

WHEREAS, the site is currently occupied by the structural steel and concrete shell for a seven-story building with a height of 91 feet (the “Current Building”), which was constructed as part of a proposed 12-story mixed-use residential/commercial/community facility building which the Department of Buildings (“DOB”), after initially approving the plans associated with the building and issuing a New Building Permit, determined did not comply with ZR § 23-692 (the “sliver rule”) due to the narrowness of the lot, and revoked the permit; and

WHEREAS, the applicant now proposes to demolish a portion of the Current Building in order to develop a six-story mixed-use residential/commercial/community facility building with first floor retail space fronting East Broadway, first floor community facility space fronting Henry Street, and 25 residential apartments on the second through sixth floors; and

WHEREAS, the proposed building will have a total floor area of 23,724 sq. ft. (4.04 FAR), including a residential floor area of 20,203 sq. ft. (3.44 FAR) (the maximum permitted residential floor area is 20,203 sq. ft. (3.44 FAR)); a commercial floor area of 2,236 sq. ft. (0.86 FAR) (the maximum permitted commercial floor

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area is 5,216 sq. ft. (2.0 FAR)); and a community facility floor area of 1,285 sq. ft. (0.22 FAR) (the maximum permitted community facility floor area is 38,175 sq. ft. (6.5 FAR)); and

WHEREAS, the proposal will have the following non-complying parameters: lot coverage of 68 percent (65 percent is the maximum permitted lot coverage); a total height of 80'-8" (a maximum building height of 75'-0" is permitted); and intrusion into the rear yard equivalent, which requires a 60'-0" open area centered at the midpoint of the length of the lot; and

WHEREAS, the applicant states that the non-compliances related to building height, lot coverage, and the required rear-yard equivalent are related to the application of ZR § 23-692; and

WHEREAS, as to the required rear-yard equivalent, because the subject lot is a through lot, ZR § 23-692 prohibits the applicant from providing the rear-yard equivalent by means of yards fronting each street, which is the method employed by the Current Building, and requires instead that the rear-yard equivalent be taken at the midpoint of the lot, where the bulk of the Current Building is concentrated; and

WHEREAS, the applicant notes that although the building was not initially proposed under the Quality Housing Program, the residential portion of the building is now proposed as Quality Housing; and

WHEREAS, the applicant further notes that, pursuant to ZR § 23-633, Quality Housing buildings have a maximum building height of 75'-0", which is more restrictive than the maximum building height of 78'-0" permitted under ZR §23-692; therefore, the more restrictive height provision of the ZR § 23-633 applies to the subject building; and

WHEREAS, the applicant initially proposed to retain all of the Current Building and construct a seven-story mixed-use building with a total height of 91 feet, a total floor area of 26,009 sq. ft. (4.43 FAR), and a residential floor area of 22,488 sq. ft. (3.83 FAR); and

WHEREAS, at the Board's direction, the applicant submitted revised plans reflecting the removal of the seventh floor of the building, resulting in the reduced building height of 80'-8" and a complying residential FAR of 3.44; and

WHEREAS, because relief from the bulk requirements of the underlying zoning district is necessary, the applicant requests the subject variance; and

WHEREAS, the applicant states that the following are unique physical conditions, which create practical difficulties and unnecessary hardship in developing the subject lot in compliance with the underlying district regulations: (1) the narrow, irregular-shaped lot; (2) the poor soil conditions; (3) the need to demolish the Pre-Existing Building and remove the existing foundations; and (4) the poor structural stability of the adjacent buildings; and

WHEREAS, the applicant initially also included an assertion that the practical difficulty and unnecessary hardship in developing the site arise from the reliance in good faith on DOB's approval of its plans and subsequent issuance of a building permit for the construction of a 12-story mixed-use building at the site; and

WHEREAS, the applicant set forth a timeline for the approval and construction process, which includes multiple meetings with plan examiners until DOB ultimately approved plans and issued a New Building Permit for the 12-story mixed-use building; subsequently, DOB responded to complaints about the building's zoning compliance and initially determined that the building complied, however, as the result of further review, DOB issued objections which led to the permit revocation; and

WHEREAS, the Board identifies the key questions that have emerged in the good faith reliance inquiry as: (1) whether the permit was void on its face; (2) whether there was any way the applicant could have known about the invalidity of the permit; and (3) whether there were multiple municipal assurances of validity; and

WHEREAS, at the beginning of the hearing process the Board raised concerns regarding the applicant's claim of good faith reliance, given that the text of ZR § 23-692 (the "sliver rule") was unambiguous and therefore the applicant had constructive notice that the text applied to the subject site; and

WHEREAS, the applicant asserted that the site is constrained by unique physical conditions and suffers an unnecessary hardship such that the requested variance is warranted even without a claim based on good faith reliance; and

WHEREAS, accordingly, the applicant revised its papers to reflect the noted unique site conditions as the basis for its hardship claim; and

WHEREAS, subsequently, the applicant did not pursue its argument that the variance be granted based on its reliance in good faith on DOB's approval of its plans and subsequent issuance of a building permit; and

WHEREAS, thus, the Board did not fully consider the initial claims of good faith reliance; and

WHEREAS, as to the irregular shape of the lot, the applicant states that because of the unusual configuration of the lot, including differing widths from one side of the lot to the other, and the combination of a narrow through lot and shallow interior lots, development on the site is constrained; and

WHEREAS, specifically, the applicant states that the narrow width triggers ZR § 23-692, which limits the height of the building to the width of the fronting street; and

WHEREAS, however, the applicant states that as

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opposed to interior lots, when ZR § 23-692 is applied to a through lot the zoning requires the construction of two buildings on the lot because it requires the rear-yard equivalent to be provided in the center of the lot; and

WHEREAS, the applicant further states that the need to provide two residential towers creates the need for a second building core, a second lobby, and additional stairs, exterior wall length, plumbing, and other systems, resulting in additional costs estimated at \$525,000; and

WHEREAS, specifically, the applicant states that if it complied with the 60'-0" open area rear yard equivalent requirement and the additional 30'-0" rear yard requirements (measured from the lot line of each of the shallow interior portions of the lot), the applicant would be left with a non-uniform tri-sectional yard area, and would have to construct two dissimilar residential towers, one at each of the two street frontages; and

WHEREAS, the applicant states that the narrowness of the lot also causes difficulty in construction equipment staging, as it requires the staging of excavation and foundation work in numerous small sectional areas rather than one or two large areas, and limits the size of the excavation and concrete equipment that could be used on the site, thereby increasing the cost of construction; and

WHEREAS, as to the uniqueness of this condition, the applicant submitted a radius diagram reflecting that there is no other through lot within 400 feet of the subject site, and that of the seven other through lots within 800 feet of the subject site, four have larger frontages and are therefore not subject to ZR § 23-692, and the three other lots that are less than 45 feet wide are all located within a C6-2 zoning district, and are therefore not subject to the height and rear yard restrictions of ZR § 23-692; and

WHEREAS, as to the poor soil conditions, the applicant states that the soil at the site has a low bearing capacity of only 1.5 tons per sq. ft.; and

WHEREAS, the applicant submitted reports from the project engineer and the contractor stating that a spread footing foundation system would normally be used for the subject site, but due to the low bearing capacity of the soil, a more costly concrete mat foundation is required for the site; and

WHEREAS, as to the uniqueness of this condition, the engineer's report states that the normal soil capacity for sites in the surrounding area is at least 2.0 tons per sq. ft., which is sufficient to support a spread footing foundation system, and that the poor soil capacity at the subject site may be explained by a localized pocket of such soil; and

WHEREAS, as to the Pre-Existing Building, the applicant states that it was an obsolete 81-year-old building with no elevators, a deficient, non-complying

rear yard, no ADA accessibility, and combustible framing, which could not have feasibly been re-used to construct an as-of-right building on the site and therefore had to be demolished; and

WHEREAS, the applicant further states that the old foundation was of a rubble stone foundation which could not be re-used for a new building, incorporated into a new foundation, or left in place to be worked around because of a history of structural problems due to settlement and movement as a result of the poor soil conditions on the site; and

WHEREAS, the applicant states that it also needed to remove a heavy foundation bed that formerly supported industrial equipment and included a number of concrete grade beams tied into the foundations of the Pre-Existing Building walls; and

WHEREAS, as to the structural stability of the adjacent buildings, the applicant states that the adjoining building to the east of the site shared party walls with the Pre-Existing Building and required extensive rebuilding and repair of the walls and foundation so as to not damage the adjacent building or cause shift, and the foundation walls of the adjacent building to the west were integrated and adhered by mortar to the walls of the Pre-Existing Building; and

WHEREAS, the applicant further states that the two adjacent buildings were sitting upon rubble stone foundations which necessitated that the applicant perform extensive underpinning, and the overall instability of the adjacent buildings required the installation of lateral bracing across both sides of the subject site to prevent the adjacent buildings from shifting or sliding; and

WHEREAS, the Board notes that the constraints related to the condition of the Pre-Existing Building, the removal of existing foundations, and the poor structural stability of the adjacent buildings are not unique to the site and are conditions generally faced by sites in the surrounding area; and

WHEREAS, the Board further notes that the applicant did not establish a basis for relief based on its good faith reliance on DOB's approval of its plans and subsequent issuance of a building permit, and the applicant did not pursue its good faith reliance claim after initially raising it; and

WHEREAS, however, the Board finds that certain of the unique conditions mentioned above, namely the narrowness of the lot and the shallowness of certain portions of the lot, as well as the poor load bearing capacity of the soil, when considered in the aggregate, create practical difficulties and unnecessary hardship in developing the site in strict compliance with applicable zoning regulations; and

WHEREAS, the applicant initially submitted a feasibility study analyzing the following scenarios: (1) the hypothetical as-of-right re-development and enlargement of the Pre-Existing Building, had the

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exterior walls been kept in place and retail and community facility use incorporated at the cellar and basement levels, with 26 residential units on the first through sixth floors; (2) the demolition of the Current Building and the construction of an as-of-right mixed-use building; (3) the demolition of the Current Building and the construction of an as-of-right community facility building; (4) a lesser variance scenario consisting of the completion of the Current Building as a seven-story mixed-use building with community facility space on the first and second floors, and with 25 residential apartments on the third through seventh floors; and (5) the initial proposal consisting of the completion of the Current Building as a seven-story mixed-use building with ground floor retail and community facility use, with 28 residential apartments above; and

WHEREAS, the applicant concluded that only the initial proposal resulted in a reasonable return; and

WHEREAS, the Board directed the applicant to analyze several other alternatives, including the current proposal which does not require a residential FAR waiver and consists of the demolition of the seventh floor of the Current Building and the re-use of the remaining six floors for a mixed-use building with ground floor retail and community facility use, with 25 residential apartments above; and

WHEREAS, the applicant submitted a revised feasibility analysis reflecting that the proposed building would also generate a reasonable return; and

WHEREAS, because the Board does not give any credit towards any costs associated with the construction or demolition of the Current Building, the Board also requested that the applicant analyze the following “clean slate” scenarios which assume that the Current Building does not exist and that new construction of a mixed-use building would require the demolition of the Pre-Existing Building: (1) the new construction of an as-of-right six- and seven-story mixed-use building, with two residential towers and a second building core; and (2) the new construction of the proposed building; and

WHEREAS, the applicant submitted a revised feasibility analysis which reflects that, even assuming the Current Building did not exist, only the proposed building would have generated a reasonable return as new construction; and

WHEREAS, based upon the above, the Board has determined that because of the subject lot’s unique physical conditions, there is no reasonable possibility that development in strict compliance with the bulk provisions applicable in the subject zoning district will provide a reasonable return; and

WHEREAS, the applicant represents that the proposed variance, if granted, will not negatively impact the character of the neighborhood, or impact adjacent

uses; and

WHEREAS, the applicant states that the surrounding neighborhood is characterized by a mix of residential, commercial, and community facility uses; and

WHEREAS, the applicant submitted a 400-ft. radius diagram reflecting that a 14-story hospital building is located one block to the southeast of the site, at the corner of Henry Street and Jefferson Street, and a 21-story residential building is located one block to the northeast of the site, along East Broadway; and

WHEREAS, the radius diagram submitted by the applicant further reflects that the majority of residential buildings in the surrounding area range in height between five and ten stories; and

WHEREAS, the applicant states that the non-complying rear yard for the proposed building will not alter the character of the surrounding neighborhood because none of the lots on the subject block have a complying rear yard; and

WHEREAS, the applicant further states that, taken as an aggregate, the yards on the East Broadway side of the building and the Henry Street side of the building (which would satisfy the rear-yard equivalent requirement if ZR § 23-692 did not apply), 29 percent of the total lot area on the subject site is dedicated to rear yards; and

WHEREAS, the applicant provided a table reflecting that the subject site has a greater portion of the lot dedicated to rear yards than any other lot on the block; and

WHEREAS, the applicant notes that the residential portion of the building will comply with all applicable Quality Housing requirements, other than building height and lot coverage; and

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

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

WHEREAS, as noted above, the applicant initially proposed to retain all of the Current Building and construct a seven-story mixed-use building with a total height of 91 feet, a total floor area of 26,009 sq. ft. (4.43 FAR), and a residential floor area of 22,488 sq. ft. (3.83 FAR); and

WHEREAS, at the Board’s direction, the applicant submitted revised plans reflecting the removal of the seventh floor of the building, which results in a complying residential FAR of 3.44, and a reduced height of 80’-8”;

WHEREAS, the Board notes that if the proposed building were not being constructed as a Quality Housing building, ZR § 23-692 would allow a maximum height of 78’-0” along East Broadway and

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78'-6" along Henry Street, based on the height of the adjacent neighbor; and

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

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

WHEREAS, the project is classified as an unlisted action pursuant to Sections 617.6(h) and 617.2(h) of 6NYCRR; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) 10BSA068M, dated December 18, 2009; and

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

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

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

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended and makes each and every one of the required findings under ZR § 72-21 and grants a variance to permit, partially within a C1-5 (R7-2) zoning district and partially within an R7-2 zoning district, the construction of a six-story mixed-use building with ground floor retail and community facility use and residential above, which does not comply with the underlying zoning regulations for height, lot coverage, and rear yard, contrary to ZR §§ 23-633, 23-692, 23-145, 23-532, 23-543, 23-47 and 24-393; *on condition* that all work shall substantially conform to drawings as they apply to the

A true copy of resolution adopted by the Board of Standards and Appeals, July 19, 2011.
Printed in Bulletin No. 30, Vol. 96.

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

objections above noted, filed with this application marked "Received June 7, 2011" – fifteen (15) sheets; and *on further condition*:

THAT the bulk parameters of the proposed building shall be as follows: a maximum total floor area of 23,724 sq. ft. (4.04 FAR); a maximum residential floor area of 20,203 sq. ft. (3.44 FAR); a maximum building height of 80'-8"; and a maximum lot coverage of 68 percent, as indicated on the BSA-approved plans;

THAT the interior layout and all exiting requirements shall be as reviewed and approved by the Department of Buildings;

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 substantial construction shall be completed in accordance with ZR § 72-23;

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

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

Adopted by the Board of Standards and Appeals, July 19, 2011.