

103-70-BZ

APPLICANT – Herrick Feinstein LLP, for 203 East 74 LLC, owner.

SUBJECT – Application July 24, 2017 – Amendment of a previously variance to facilitate the transfer of unused development rights from the variance site for incorporation into a new as-of-right development. C1-9/R8B zoning district.

PREMISES AFFECTED – 203 East 74th Street, Block 1429, Lot 103, Borough of Manhattan.

COMMUNITY BOARD #8M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta and Commissioner Scibetta.....5

Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application to reopen and amend a variance, previously granted by the Board, which permitted the erection of a ten- (10) story multiple dwelling that does not comply with the zoning requirements for rear yards and lot line windows; and

WHEREAS, the purpose of this application is to facilitate the transfer of 6,503 square feet of unused commercial development rights appurtenant to the subject site by the owner of the site to the owner of a development site (tentatively comprised of Block 1429, Lots 3, 4 and 44, the “Development Site”) to be incorporated into a mixed-used commercial and residential building; and

WHEREAS, a public hearing was held on this application on January 29, 2019, after due notice by publication in *The City Record*, and then to decision on February 12, 2019; and

WHEREAS, Chair Perlmutter, Vice-Chair Chanda and Commissioner Scibetta performed inspections of the subject site and surrounding neighborhood; and

WHEREAS, Community Board 2, Manhattan, opposes this application on account of the height of the proposed development on the Development Site; and

WHEREAS, the Board was in receipt of 11 letters in support of, and 14 letters in opposition to, this application and

WHEREAS, this application is brought on behalf of 203 East 74 LLC, which owns the subject site and seeks the Board’s authorization to merge the subject site with the Development Site; and

WHEREAS, the subject site is located on the north side of East 74th Street, between Third Avenue and Second Avenue, partially within a C1-9 zoning district and partially within an R8B zoning district, in Manhattan; and

WHEREAS, the site has approximately 39 feet of frontage, 62 feet of depth, 4,965 square feet of lot area and is occupied by a seven- (7) story plus cellar and two (2) mezzanine mixed-use residential and commercial

building containing 18,474 square feet of floor area; and

WHEREAS, the Board has exercised jurisdiction over the subject site since September 22, 1970, when, under the subject calendar number, the Board granted a variance to permit, in a then C1-9 zoning district, the erection of a ten- (10) story multiple dwelling that encroached on the required rear yard and with windows that encroached on the minimum distance to a lot line, on condition that the work conform to plans filed with the application; all laws, rules and regulations applicable be complied with; and, substantial construction be completed within one (1) year, by September 22, 1971 (the “Variance”); and

WHEREAS, on the same date, under BSA Cal. No. 104-70-A, the Board granted an appeal, pursuant to Section 310 of the Multiple Dwelling Law, of the decision of the Department of Buildings on condition that the building substantially conform to plans filed with BSA Cal. No. 103-70-BZ; the resolution adopted by the Board under BSA Cal. No. 103-70-BZ be complied with; and, all laws, rules and regulations applicable be complied with; and

WHEREAS, on November 16, 1971, under the subject calendar number, the Board reopened and amended the resolution to extend the time to complete construction for one (1) year, by November 16, 1972; and

WHEREAS, on March 28, 1972, under the subject calendar number, the Board amended the variance, granted on September 22, 1970, as amended through November 16, 1971, to permit the building to be redesigned, rearranged and constructed substantially as shown on plans filed with the application, on condition that other than as amended the resolution be complied with in all respects; and

WHEREAS, the applicant additionally requests an amendment to reflect the existing building condition of seven (7) stories plus two (2) mezzanine levels, for a total of nine (9) stories, and 20 dwelling units; and

WHEREAS, the applicant states that the proposed transfer of development rights is consistent with the New York Court of Appeals’ decision in *Bella Vista v. Bennett*, 89 N.Y.2d 565 (1997), setting forth the parameters of Board review of requests for the transfer of development rights from sites for which a variance has been previously granted; and

WHEREAS, the applicant represents that the transfer of the unused development rights from the subject site is not in conflict with the Variance; and

WHEREAS, the applicant notes that the Board made all of the findings required pursuant to ZR § 72-21 in the Resolution for the Variance (the “Resolution”), but that the Resolution is silent as to whether the Board assigned any value to the unused development rights at the subject site; and

WHEREAS, accordingly, the applicant states that it can be assumed that the Board ascribed no value to the

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unused development rights and, in support of that assumption, submits a letter from a financial consultant analyzing the value of the unused development rights appurtenant to the subject site in 1970 and 1971 and concluding that the rights, indeed, had no value at that time because (1) due to the existence of a residential building on Lot 5 that is non-compliant with regards to floor area and residential buildings located on Lots 1, 2 and 3 subject to rent stabilization, the parcels surrounding the Property were unlikely to have purchased the unused development rights from the Property at the time of the variance or amendment and (2) all adjacent lots that might have provided opportunities for the transfer of unused development rights were held in separate ownership from the subject site; and

WHEREAS, finally, the applicant notes that the mechanism for enabling the transfer of development rights through zoning lot mergers was only added to the Zoning Resolution in 1977, when economic conditions in New York City were severely distressed, and it was not until the early- to mid-1980s that the economic climate stabilized to the point of becoming conducive to new real estate development, including developments incorporating the transfer of unused development rights; and

WHEREAS, the applicant also provided a copy of the financial evaluation submitted into the Board's records with regards to the Variance (stamped "Received," December 18, 1970) and the Board notes that this evaluation did not, in fact, ascribe any value to unutilized floor area; and

WHEREAS, therefore, the applicant states that an amendment to the variance to facilitate the transfer of the unused development rights from the subject site to the Development Site does not undermine the integrity of the Board's earlier findings with regards to ZR §§ 72-21(b) or 72-21(e) because the facts of the instant application are readily distinguishable from those underlying the Court's holding in *Bella Vista*; and

WHEREAS, specifically, as stated above, the applicant submits that, at the time of the variance, the subject premises were held in separate and unrelated ownership from all other adjacent parcels on the subject block and that more than 45 years have elapsed since the grant of the Variance; and

WHEREAS, the Board notes that *Bella Vista* concerned a permit request for a new as-of-right residential building proposed to be built through the transfer of development rights—from a site in which the Board granted a use variance to permit the operation of a movie theater in a residential zoning district, to a separate adjacent site under common ownership—for the development of a complying residential building; and

WHEREAS, the Court held that review and approval of such transfers by the Board was required, *inter alia*, because the basis for the original grant, particularly with respect to the findings of financial

hardship under ZR § 72-21(b) and minimum variance needed to provide relief under ZR § 72-21(e), may be implicated by the proposed transfer; and

WHEREAS, the Board credits the applicant's assertions that, unlike in *Bella Vista*, the subject site and Development Site have been under separate, unrelated ownership since the Variance and that, therefore, the applicant lacked control over the timing and nature of the development of the Development Site; and

WHEREAS, the Board also notes that a brief period elapsed between the issuance of the variance underlying the *Bella Vista* decision and the date of the permit application in which the owner proposed to use the floor area transferred from the variance site, further distinguishing that case from the instant application; and

WHEREAS, the Board acknowledges that in *Bella Vista*, the permit application proposing to use floor area transferred from the variance site was filed only three years after the Board grant, whereas the subject Variance was issued more than 45 years ago; and

WHEREAS, the Board agrees that the differences in timing and the health of the respective real estate markets distinguish the *Bella Vista* case from the instant case and supports the conclusion that the use of the subject site's unused development rights was not foreseeable by the owner of the Development Site or the Board; and

WHEREAS, therefore, the Board finds that the proposed transfer of development rights does not implicate or affect the basis for its findings pursuant to ZR § 72-21, specifically the (b) and (e) findings, at the time that they were made; and

WHEREAS, with regards to a further amendment reflecting the as-built conditions of the building, the Board notes that the Variance permitted a ten- (10) story plus cellar building with a front wall height of 85 feet and that the existing condition plans provided by the applicant show a nine- (9) story plus cellar building with a front wall height of 81 feet and, thus, the building, as-built, is within the scope of the Variance and does not require additional relief with regards to rear yard depth or distance between windows and lot lines; and

WHEREAS, based upon its review of the record, the Board amends the variance to reflect the as-built condition of the site and does not object to the transfer of unused development rights from the subject site to the Development Site or to the proposed zoning lot merger with the conditions set forth below.

Therefore, it is Resolved, that the Board of Standards and Appeals *reopens* and *amends* the resolution, adopted on September 22, 1970, as amended through March 28, 1972, so that as amended this portion of the resolution shall read: "to permit the merger of the subject site with contiguous parcels on Block 1429, in Manhattan, and the associated modifications to the BSA-

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approved site plan; and; *on condition* that all work, operations and site conditions shall conform to drawings filed with this application marked 'Received October 17, 2018'-One (1) sheet; and *on further condition*:

THAT the zoning calculations, including any transfer of development rights, shall be subject to DOB's review and approval and shall be in full compliance with underlying bulk regulations;

THAT the site shall remain subject to the Board's jurisdictions, including modifications to the buildings on the site;

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

THAT further changes to any site plan including the subject site may be subject to Board review and approval;

THAT the above conditions shall appear on the certificate of occupancy;

THAT a certificate of occupancy, also indicating this approval and calendar number ("BSA Cal. No. 103-70-BZ"), shall be obtained within one (1) year, by February 12, 2020;

THAT DOB shall 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, February 12, 2019.

**A true copy of resolution adopted by the Board of Standards and Appeals, February 12, 2019.
Printed in Bulletin No. 8, Vol. 104.**

Copies Sent

**To Applicant
Fire Com'r.
Borough Com'r.**

