

**1151-81-BZ**

APPLICANT – Greenberg Traurig, LLP  
SUBJECT – Application May 19, 2016 – 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. M1-6 (IHDA) zoning district.

PREMISES AFFECTED – 95 Vandam Street, Block 00597, Lot 7501, Borough of Manhattan.

**COMMUNITY BOARD #2M**

**ACTION OF THE BOARD** – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Commissioner Montanez and Commissioner Chanda.....3  
Negative: .....0  
Abstain: Vice-Chair Hinkson .....1  
Absent: Commissioner Ottley-Brown.....1

THE RESOLUTION –

WHEREAS, this is an application to reopen and amend a variance, previously granted by the Board, which permitted residential uses on all floors above the first floor of a six-story former manufacturing building in an M1-6 zoning district; and

WHEREAS, the purpose of this application is to facilitate the transfer of 18,667 square feet to unused development rights appurtenant to the subject site by the owner of the site to the owner of a development site (tentatively comprised of Block 597, Lots 39 and 46, 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 September 27, 2016, after due notice by publication in *The City Record*, with a continued hearing on January 24, 2017, and then to decision on the same date; and

WHEREAS, Vice-Chair Hinkson, Commissioner Ottley-Brown, Commissioner Montanez and Commissions Chanda performed inspections of the subject site and surrounding neighborhood; and

WHEREAS, Community Board 2, Manhattan, recommends approval of this application; and

WHEREAS, this application is brought on behalf of the V-Dog Condominium, 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 Vandam Street, between Greenwich Street and Hudson Street, within an M1-6 zoning district and the Special Hudson Square District, in Manhattan; and

WHEREAS, the site has approximately 49 feet of frontage along Vandam Street, 4,965 square feet of lot area and is occupied by a six-story building containing 26,848 square feet of floor area; and

WHEREAS, the Board has exercised jurisdiction over the subject site since June 15, 1927, when, under BSA Cal. No. 35-27-S, the Board granted a variance from the labor law to permit egress from the existing six-story building to the fire escape on an adjacent building to the

west; and

WHEREAS, on June 5, 1928, under BSA Cal. No. 90-28-S, the Board granted another variance from the labor law, which required the provision of a fire-resistant enclosure around an interior stairway; and

WHEREAS, on March 20, 1984, under the subject calendar number, the Board granted a variance, pursuant to ZR § 72-21, to permit the maintenance of all floors above the first floor as a multiple dwelling on condition, *inter alia*, that double-glazed windows and mechanical ventilation systems be provided to attenuate exterior ambient noise levels to less than 40 dBA within the residential portions of the building (the “Variance”); and

WHEREAS, on October 8, 1985, under BSA Cal. No. 1152-81-ALC, the Board granted an application to exclude a total of 21,875 square feet of floor area (4,375 square feet on each of the second through sixth floors) from the payment of the conversion contribution then required pursuant to ZR § 15-551 in connection with conversion of the second through sixth floors of the existing building to residential use; and

WHEREAS, the applicant represents that no changes to the subject building are associated with the proposed merger of the zoning lots and development rights transfer; and

WHEREAS, in addition, 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 assumes that the Board ascribed no value to the 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 1984 and concluding that the rights, indeed, had no value at that time because (1) the excess development rights could only be utilized to enlarge the existing six-story building with commercial or manufacturing uses and the market for such uses in the early 1980s was severely limited and (2) that all adjacent properties were held in separate ownership and, thus, there was no market for the transfer of these excess development rights; and

WHEREAS, the applicant additionally contends that ten of the 11 lots directly adjacent or secondarily

**1151-81-BZ**

adjacent to the subject lot that could have purchased its excess development rights were significantly underbuilt in 1984 and, thus, could have enlarged their buildings using their own unutilized floor area, but that existing bulk regulations prevented the full use of that floor area, making it further unlikely that these sites, which the applicant characterizes as narrow and irregularly shaped, would have provided a market for the subject site's excess development rights; and

WHEREAS, with regards to the last of the 11 lots directly adjacent or secondarily adjacent to the subject lot, the applicant states that the building on that lot was likely overbuilt at the time of the Variance and, as it is only secondarily adjacent to the subject lot, would have needed to merge with other zoning lots in addition to the subject site in order to use the subject site's excess development rights and, because these interstitial sites were underbuilt, the eleventh lot would have been much more likely to enlarge with the unutilized floor area appurtenant to those underbuilt sites than use the excess development rights of 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 and, at the time, economic conditions in New York City were severely distressed, thus, development rights transfers in 1988 were highly unlikely in the zoning district; 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 parcels on the subject block and that more than 30 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 that 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 of time 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 30 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 instance 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, at hearing, the Board requested that the applicant demonstrate compliance with the conditions of the prior Resolution, including the condition requiring noise attenuation measures in the form of double-glazed windows upon the observation that several windows appear to be original and single-paned; and

WHEREAS, in response, the applicant submitted a technical memorandum analyzing whether such window attenuation remained necessary to achieve the interior noise levels deemed acceptable by the CEQR Technical Manual noise exposure guidance; and

WHEREAS, the technical memorandum, completed upon the performance of noise testing at the premises during the pendency of this application, concluded that the maximum measured noise level was in the "Acceptable" category of residential uses and below the 70 dBA threshold at which window attenuation is required under the CEQR Technical Manual; and

WHEREAS, by letter dated November 30, 2016, the New York City Department of Environmental Protection ("DEP"), determined that, upon review of the submitted noise analysis and data, no potential significant adverse noise impacts were expected; and

WHEREAS, the applicant also submitted evidence sufficient to prove compliance with regards to the remaining conditions imposed on the site in connection with the Variance; and

WHEREAS, based upon its review of the record,

**1151-81-BZ**

the Board 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, but notes that any further changes to the subject site that are inconsistent with this or prior approvals are subject to the Board's review and approval.

*Therefore, it is Resolved,* that the Board of Standards and Appeals *reopens* and *amends* the resolution, adopted on March 20, 1984, so that as amended this portion of the resolution shall read: to permit the merger of the subject site with contiguous parcels on Block 597, in Manhattan, and the associated modifications to the BSA approved site plan; and *on 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 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, January 24, 2017.

**A true copy of resolution adopted by the Board of Standards and Appeals, January 24, 2017.  
Printed in Bulletin Nos. 4-5, Vol. 102.**

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

