

117-03-A

APPLICANT - Molly Abady (Luca Sartini, Toni Vastinar.

OWNER OF PREMISES: Memorial Hospital.

SUBJECT - Application April 11, 2003 - An appeal challenging the Department of Buildings determination, dated March 24, 2003, in which the Department has stated that the project (research laboratory), is allowed as a Use Group 4, hospital "related facility". As a "related facility", (Sloan Kettering) the use is allowed as of right in a residential district.

PREMISES AFFECTED - 411/25 East 68th Street, Mid-block, between First and York Avenues, Block 1463, Lots 5, 9 and 11, Borough of Manhattan.

APPEARANCES -

For Applicant: None.

ACTION OF THE BOARD - Appeal denied.

THE VOTE TO GRANT -

Affirmative:.....0

Negative: Chairman Chin, Vice-Chair Babbar, Commissioner Caliendo and Commissioner Miele.....4

THE RESOLUTION -

WHEREAS, the instant appeal comes before the Board in response to a determination issued March 24, 2003 by the New York City Department of Buildings ("DOB") to certain aggrieved individuals (collectively, the "appellants"), who had requested revocation of a DOB permit allowing construction of a proposed medical research facility (the "proposed facility") at the subject premises; and

WHEREAS, said DOB determination states, in part, "The Department of Buildings has reviewed your concerns and has determined that the project is allowed as a Use Group 4, hospital 'related facility'. As a 'related facility', the use is allowed as of right in a residential district;" and

WHEREAS, the record shows that on May 21, 2001, a DOB plan examiner issued an objection to the new building application for the proposed facility, on the basis that the paperwork submitted with the application indicated that the proposed facility was a laboratory, and best categorized under Use Group ("UG") 9 or 17, and thus not permitted as-of-right in an R8 or R9 zoning district; and

WHEREAS, the record shows that this particular objection was satisfied as of November 14, 2002, and that DOB subsequently issued a new building permit for the proposed facility on January 10, 2003; and

WHEREAS, the subject premises is located within R8 and R9 zoning districts, and also within a designated large-scale community facility development (the "development"), which was the subject of recent approvals by the City Planning Commission ("CPC"), dated November 28, 2001, under application numbers C010547ZMM, C010548ZSM, and N010549ZMM; and

WHEREAS, the afore-mentioned C.P.C. approvals reference the proposed facility, and note that the

designation of the MSKCC as a large-scale community facility development allows C.P.C. to waive certain bulk regulations for the proposed facility; and

WHEREAS, the development contains various medical facilities (including a hospital) and related uses, located within a three-block area, generally bounded by East 66th Street on the south, East 69th Street on the north, First Avenue on the west, and York Avenue on the east - said area making up the Memorial Sloan-Kettering Cancer Center ("MSKCC") campus; and

WHEREAS, the proposed facility will be situated on the north block of the MSKCC campus, which currently contains an existing MSKCC research facility, vacant land and a church; and

WHEREAS, the middle block of the MSKCC campus contains various medical buildings, the Radiation Oncology Building, Memorial Hospital ("Memorial"), and Winston Surgical Pavilion; and

WHEREAS, the record shows that the proposed facility will be sited directly across the street from Memorial; and

WHEREAS, the south block of the MSKCC campus contains the Rockefeller Research Laboratory, staff housing and offices; and

WHEREAS, appellants note that prior to issuance of its March 24, 2003 decision, DOB issued an objection to the application for the proposed facility, which stated that the proposed facility should be classified as a UG 9 or 17 research lab; and

WHEREAS, appellants claim that the proposed facility is a UG 17 use, pursuant to Z.R. §42-14(b), which lists, in part, permitted UG 17 uses, and which includes "laboratories, research, experimental, testing" as a listed use; and

WHEREAS, appellants further claim that since the proposed facility properly falls under UG 17, it is not permitted as-of-right in R8 or R9 zoning districts; and

WHEREAS, appellants contend that because the proposed facility will not be used for direct patient care and is not owned or operated by a particular hospital, it can not be considered a "hospital related facility", which, pursuant to Z.R. §22-14, is listed as UG 4; and

WHEREAS, appellants argue that, pursuant to Z.R. §§22-00 and 42-00, which both provide "Whenever a use is specifically listed in a Use Group and also could be construed to be incorporated within a more inclusive listing, either in the same or another Use Group, the more specific listing shall control," the proposed facility must be characterized as a UG 17 research laboratory; and

WHEREAS, appellants maintain that representatives of MSKCC did not file for a Certificate of Need for the proposed facility with the New York State Department of Health ("NYSDOH"), pursuant to

117-03-A

Section 2802 of the Public Health Law, and in correspondence to NYSDOH, stated that such certificate is not necessary for a facility that does not meet the definition of a hospital, does not provide direct treatment to patients, and is not sufficiently related to a hospital; and

WHEREAS, appellants assert that since the proposed facility is not hospital related per the Public Health Law, it can not be a hospital related facility pursuant to Z.R. §22-14; and

WHEREAS, appellants contend that there will be no involvement in patient care at Memorial by staff at the proposed facility; and

WHEREAS, appellants argue that because the proposed facility is a UG 17 research laboratory, it can not be a community facility, and therefore may not enjoy any community facility floor area bonus; thus its proposed bulk is contrary to zoning regulations; and

WHEREAS, appellants contend that the proposed facility would have a deleterious effect on the immediate community; and

WHEREAS, DOB represents that the proposed facility and Memorial are owned by entities which are under the same ownership umbrella of MSKCC; and

WHEREAS, DOB notes that the relevant lots within the development are all owned by related entities of MSKCC; and

WHEREAS, the record shows that the medical facilities within the development are owned by various MSKCC-related but separate corporate entities, including Memorial, the Sloan Kettering Institute for Cancer Research ("SKI"), and SKI Realty, and that said entities, while separate, share members of boards of managers and have established joint committees; and

WHEREAS, the record shows that the subject premises was originally purchased by Memorial, with ownership subsequently transferred to SKI when it was decided that the property would be utilized for its currently contemplated purposes; and

WHEREAS, DOB notes that it relied upon CPC's finding that the proposed facility is part of a large-scale community facility development, which also includes Memorial, in classifying the proposed facility a UG 4 hospital related facility;; and

WHEREAS, DOB notes that the projected use of the proposed facility for cancer research is directly related to the services provided by Memorial, a leading hospital for cancer care, and that Memorial has a programmatic need for a state-of-the-art facility of the type proposed; and

WHEREAS, DOB further notes that researchers at the proposed facility will collaborate with Memorial's treatment providers for patient care purposes, and that the two facilities will share staff; and

WHEREAS, the record indicates that the employees of the proposed facility will be employees of MSKCC and that many of the physicians conducting

research at the facility will also be treating patients at Memorial, though some outside researchers may conduct research at the proposed facility; and

WHEREAS, the record indicates that tissue research conducted at the proposed facility depends on the proximity to the patients from whom the tissue samples will be taken; and

WHEREAS, DOB maintains, and the Board agrees, that the requirements of the NYSDOH in evaluating the necessity of a Certificate of Need are separate and distinct from those of DOB in evaluating the proposed facility in light of the Z.R.; and

WHEREAS, the Board notes that the record shows that a facility at 435 E. 67th Street was defined by DOB as a hospital related facility, and that said facility contains laboratories, tissue culture rooms, research, and animal housing; and

WHEREAS, the Board notes that the March 24, 2003 DOB determination, issued by DOB's Manhattan Borough Commissioner, overruled the DOB objection related to the Use Group categorization of the proposed facility, issued on May 21, 2001 by a DOB plan examiner; and

WHEREAS, the Board observes that DOB plan examination objections are routinely overruled upon reconsideration by DOB Borough Commissioners, and that the existence of such an overruled objection is not binding upon DOB or the Board; and

WHEREAS, the Board notes that CPC, in its recent approvals concerning the development, discussed the proposed facility as part of said development (a large-scale community facility development pursuant to Z.R. §12-10); and

WHEREAS, the Board notes that the environmental impacts of the proposed facility have been duly considered, and that an Environmental Impact Statement has been filed and adopted by the Board; and

WHEREAS, the Board notes that in its prior decision concerning the proposed facility, BSA case number 130-01-BZ (the "prior decision"), it found that the proposed facility would "not have any significant adverse impacts upon the quiet, privacy, light, and air of the surrounding neighborhood"; and

WHEREAS, the Board notes that the record shows that the proposed facility will be a not-for-profit entity, primarily used for cancer research, and that Memorial is a leading hospital specializing in the treatment of cancer, and that the two facilities will be directly across the street from one another; and

WHEREAS, the Board observes that in the prior decision, MSKCC demonstrated that the proposed facility must be in close proximity to the clinical treatment facilities located across the street (Memorial); and

117-03-A

WHEREAS, the Board notes that in the prior decision, MSKCC demonstrated that “its programmatic needs for future growth and a world-renowned cancer center require the requested state-of-the-art laboratories and related equipment and office units which will provide for research and related clinical integration within the limited land which it has available for development in the immediate proximity to its other clinical and research buildings”; and

WHEREAS, the Board notes that in the prior decision, it determined that the existing MSKCC research facility, which will be replaced by the proposed facility, is a community facility; and

WHEREAS, the Board finds that Z.R. §§22-00 and 42-00 are inapplicable to the instant facts, as the proposed facility meets the definition of hospital related facility, as set forth at Z.R. §22-14(a); and

WHEREAS, the Board finds that, based on the evidence, the proposed facility is a UG 4 hospital related facility, and is therefore permitted as of right in R8 and R9 zoning districts; and

WHEREAS, consequently, the Board finds that, based on the evidence, the March 24, 2003 DOB determination described above was reasonable; and

Therefore, it is resolved that the final determination of the New York City Department of Buildings, dated March 24, 2003, is upheld and this appeal is denied.

Adopted by the Board of Standards and Appeals, September 30, 2003.

**A true copy of resolution adopted by the Board of Standards and Appeals, September 30, 2003.
Printed in Bulletin No. 40-41, Vol. 88.**

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.