149-08-A
APPLICANT – Jack Lester, for Neighbors, et al, owner.
SUBJECT – Application May 29, 2008 – Appeal seeking to revoke permits and approvals for a 30 story mixed use building that allow violations of the zoning regulations on open space, parking, curb cuts and proper use group classification. R7-2/C1-5 zoning district.
PREMISES AFFECTED – 808 Columbus Avenue, 97th and 100th Street and Columbus Avenue, Block 1852, Lots 5, 15, 20, 23, 25, 31, Borough of Manhattan.
COMMUNITY BOARD #7M
APPEARANCES –
For Applicant: Jack Lester.
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, the instant appeal comes before the Board in response to a determination of the Manhattan Borough Commissioner, dated May 2, 2008, to uphold the approval of New Building Permit No. 104464438 permitting the construction of a 29-story mixed-use multiple dwelling located in an R7-2 zoning district with a C1-5 overlay on a multiple building zoning lot; and

WHEREAS, the Final Determination reads, in pertinent part:

> "As discussed below, the issues in your letter regarding the permit's compliance with zoning regulations of open space and use group classification do not present a cause to revoke the permit.
>
> First, your letter questions whether the allocation of open space per residential building is consistent with the Zoning Resolution's (ZR) § 12-10 definition of "open space" that describes such space, in part, as "accessible to and usable by all persons occupying a dwelling unit . . . on the zoning lot." The approved plans indicate that occupants of each unit of a building will have access to an amount of open space that meets the open space ratio applied to the building in accordance with ZR Sections 23-14 and 23-142, and therefore the permit application properly demonstrates the required amount of open space. Contrary to your claim, the ZR does not specify that open space on a multiple building zoning lot must be shared spaced that is commonly accessible to all occupants of the zoning lot.
>
> . . . Your letter [also] challenges the Use Group 6 classification of the retail store proposed in the new building. Your letter alleges that this establishment is a Whole Foods market that offers services not limited to grocery sales, and that its size and associated traffic classify it as a Use Group 10 variety store prohibited in the C1-5 district. Whole Foods Markets have been properly classified under ZR § 32-15 Use Group 6 in other locations in the City as food stores. There is no authority in the ZR for the Department to consider store size and traffic impact as factors that determine inclusion in the use group;"
>
> and

WHEREAS, a public hearing was held on this appeal on October 28, 2008, after due notice by publication in the *City Record*, with continued hearings on November 18, 2008 and December 16, 2008, and then to decision on February 3, 2009; and

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

PARTIES AND SUBMITTED TESTIMONY

WHEREAS, this appeal is brought by residents of the subject site and surrounding area (collectively, the "appellants"); and

WHEREAS, subject site is owned by 808 Columbus, LLC (the "owner"); and

WHEREAS, the appellants, the Department of Buildings ("DOB") and the owner have been represented by counsel throughout this proceeding; and

WHEREAS, the following elected officials provided testimony in support of this appeal Borough President Scott M. Stringer, Congressman Charles B. Rangel, and Assembly Member Daniel J. O'Donnell; and

WHEREAS, representatives of the Park West Village Tenants Association, the Coalition to Preserve Park West North, the Park West Neighborhood History Group, and other local residents provided written and oral testimony in support of this appeal; and

WHEREAS, several neighborhood residents provided written and oral testimony in opposition to this appeal; and

THE SITE

WHEREAS, the subject site is located on a superblock (Block 1852) bounded by West 97th Street on the south, Columbus Avenue on the west, West 100th Street on the north, and Central Park West on the east[2]; and

WHEREAS, the subject site is located on a Zoning Lot occupied by Park West Village, an existing housing development; and

WHEREAS, the Zoning Lot consists of Tax Lots 5, 20, 25, and 31; and

WHEREAS, the subject site is located on Columbus Avenue between West 97th Street and West 100th Street on Block 1852, Tax Lot 25; and

WHEREAS, the subject site is located in an R7-2 zoning district with a C1-5 overlay on the Columbus Avenue frontage extending to a depth of 100 feet; and

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

2 Park West Village also includes a second superblock which is not implicated by the instant appeal.

WHEREAS, the subject site was formerly occupied by two one-story commercial buildings which have been demolished; and

WHEREAS, the subject site is proposed to be occupied with a 29- story mixed use commercial and residential building (the "proposed building"); and

WHEREAS, the cellar and subcellar of the proposed building are proposed to be occupied by a 324-car accessory parking garage, and a portion of the first floor and cellar are proposed to be occupied by a Use Group 6 supermarket; and

WHEREAS, the remainder of Zoning Lot, comprised of Tax Lots 5, 20, and 31 to the west of the subject site, is occupied by three 16-story residential buildings (the "existing buildings"); and

WHEREAS, the Park West Village development was constructed within the West Park Urban Renewal Area (the "Urban Renewal Area"), pursuant to a redevelopment plan for the area approved by the Board of Estimate on May 22, 1952 (the "Redevelopment Plan") in conjunction with the designation of the Urban Renewal Area; and

PROCEDURAL HISTORY

WHEREAS, as discussed above, the instant appeal concerns the issuance by DOB of New Building Permit No. 104464438 permitting development of a 29-story mixed-use building at the subject site; and

WHEREAS, in connection with the approval of the Permit, the owner requested and received several zoning reconsiderations of the project by DOB, including a reconsideration which allowed the open space required on the Zoning Lot pursuant to ZR § 23-142 to be allocated among the proposed building and the three existing buildings on the Zoning Lot (the "DOB Reconsideration"); and

WHEREAS, in letters to DOB dated July 27, 2007 and February 7, 2008, the Manhattan Borough President argued that the reconsiderations granted for the proposed building were based on an erroneous interpretation of the applicable provisions of the Zoning Resolution; and

WHEREAS, on May 2, 2008, the Manhattan Borough Commissioner issued the Final Determination, cited above, that forms the basis of the instant appeal; and

WHEREAS, on May 29, 2008, the appellants filed the instant appeal at the BSA; and

ISSUES PRESENTED

WHEREAS, the appellants contend that the proposed building violates open space requirements of the Zoning Resolution and the Redevelopment Plan, that the proposed supermarket is not permitted in the subject zoning district, and that its approval violates State and City environmental law, therefore, that the Permit should be revoked; and

WHEREAS, the appellants make the following primary arguments in support of their position that the Permit for the Proposed building should be revoked: (i) open space will not be usable and accessible to all residents of the Zoning Lot as required by the Zoning Resolution; (ii) the open space and height of the proposed building violates the Redevelopment Plan; (iii) the proposed supermarket is more appropriately classified as a department store or a variety store; and (iv) a required review of the potential environmental impacts of the proposed supermarket was not undertaken; and

WHEREAS, these four arguments are addressed below; and

Whether the Proposed Building Violates the Open Space Requirements of the Zoning Resolution

WHEREAS, the appellants assert that the proposed building violates the open space requirements for the following reasons: (i) open space will not be usable and accessible to all residents of the Zoning Lot as required by the Zoning Resolution; (ii) the allocation of open space among the residential buildings of the Zoning Lot violates a DOB directive; (iii) the intent of the Zoning Resolution is to permit access by all residents of a Zoning Lot to all open space on that Zoning Lot; and (iv) the open space allocation deprives existing residents of an equitable share of open space; and

WHEREAS, the appellants contend that DOB failed to ensure that open space sufficient to support the proposed building's floor area that is accessible to all the occupants of the Zoning Lot is provided as required by ZR §§ 23-142 and 12-10 and, therefore, the Permit should be revoked; and

WHEREAS, the appellants further contend that because rooftop open space above a one-story portion of the proposed building will be reserved for the residents of that building, DOB failed to ensure that the open space on the subject site will be accessible to all residents of the existing buildings as required by ZR § 12-10; and

WHEREAS, DOB states that an allocation of open space required for each building on a Zoning Lot is consistent with the requirements of the Zoning Resolution because ZR § 12-10 defines "open space" as "accessible to and usable by all persons occupying a dwelling unit . . . on the zoning lot" and

WHEREAS, DOB further states that the definition of open space must be read in the context of the calculation of open space set forth in ZR §§ 23-14 and 23-142, which require a minimum amount of open space with respect to "any building" on a zoning lot, rather than to all buildings on a zoning lot; and

WHEREAS, ZR § 23-142 provides that the permissible floor area of a building is dependent on a calculation of the "height factor" of a development and the amount of open space provided on its zoning lot; and

WHEREAS, the Building is proposed to provide 1,023,125 sq. ft. of residential floor area, and will have a residential lot coverage of 67,422 sq. ft., with a resulting height factor of 15; and

WHEREAS, ZR § 23-142 imposes a minimum open space ratio of 22.5 for residential construction in an R7-2 zoning district with a height factor of 15; and

WHEREAS, the owner represents that the residential floor area on the Zoning Lot generates a requirement of 230,203 sq. ft. of open space, and that the zoning calculations indicated that a total of 240,331 square feet of open space will be provided on the Zoning Lot; and

WHEREAS, DOB contends that the Permit is valid

because the application documents for the proposed building demonstrate the required amount of open space on the Zoning Lot and compliance with the open space requirements of ZR §§ 23-142 and 12-10; and

WHEREAS, the DOB Reconsideration allows the required open space to be allocated among the four residential buildings on the Zoning Lot, with open space that will be located on the roof of the one-story commercial portion of the proposed building to be dedicated to the residents of that building; and

WHEREAS, DOB further contends that ZR §§ 23-14 and 23-142 require open space with respect to a building, rather than to the zoning lot as a whole, and therefore were satisfied by the Permit application which provides the required amount of open space to each building on the Zoning Lot; and

WHEREAS, the owner states that residents of the existing buildings will have access to other open space at grade level that satisfies the applicable open space requirements of the Zoning Resolution; and

WHEREAS, the owner further states that the current open space at grade will be improved and that a significant amount of open space previously occupied by accessory parking will be landscaped; and

WHEREAS, DOB further states that the ZR § 12-10 definition of "open space" does not specify that open space on a multiple building dwelling lot must be common, centralized space that is shared by all occupants of the zoning lot; and

WHEREAS, the owner argues that neither ZR §§ 12-10, 23-14, nor any other provision of the Zoning Resolution, expressly concerns a condition involving multiple buildings on a zoning lot, nor requires that open space on a multi-building zoning lot be shared space that is commonly accessible to all the occupants of a zoning lot; and

WHEREAS, the owner contends that because the applicable open space requirements are expressed with reference to a single building, open space can therefore be allocated among buildings; and

WHEREAS, the owner points out that ZR § 23-14 states that "for any building on a zoning lot, the minimum required open space or open space ratio shall not be less than set forth in this Section …" and ZR § 23-142 likewise provides that "in the districts indicated, the minimum required open space ratio and the maximum floor area ratio for any building on a zoning lot shall be as set forth in the following table…."; and

WHEREAS, the owner further contends that there is no provision in the Zoning Resolution explicitly prohibiting an allocation of required open space among several buildings; and

WHEREAS, the appellants further argue that their contention that all open space on the subject site must be open to all residents of the Zoning Lot is supported by a Directive of DOB's Director of Operations dated May 28, 1968 (the "1968 Directive"); and

WHEREAS, the 1968 Directive includes the statement that "[s]ubdivision(b) shall be interpreted to mean that all open space shall be accessible to and usable by all the residents of the building or buildings;" and

WHEREAS, DOB argues that, rather than compelling the creation of common open space for occupants of all buildings on a multiple building zoning lot, the Directive allows the applicant to choose whether to allocate open space generated by each building to be accessible and usable only to the residents of that building or to be accessible to all residents of all the buildings; and

WHEREAS, DOB states that the Permit application indicates that the residents of each building will have access to an amount of open space that meets the open space ratio of ZR § 23-142 and therefore conforms to the 1968 Directive; and

WHEREAS, DOB states that there is no support for the appellant's claim that the only means of satisfying the requirement for open space on a multiple building zoning lot is to dedicate all open space to all buildings on the lot; and

WHEREAS, DOB further states that compliance with the statute is not undermined by limiting access and use of open space for the new building to its occupants; and

WHEREAS, the appellants contend that the intent of the Zoning Resolution was to permit access to all open space on a Zoning Lot to all residents of the Zoning Lot; and

WHEREAS, the owner argues that the goal of the open space provisions is to ensure that all persons residing on a zoning lot have access to a prescribed amount of open space, which is achieved when each building on a large zoning lot improved with multiple buildings is allocated at least as much accessible open space as would be required for that building if it were located on a separate zoning lot; and

WHEREAS, the Board notes that the purported intent of the Zoning Resolution is not clearly stated and that the Board is not permitted to construe the intent of the Zoning Resolution, but is limited to the "four corners" of the statute (see McKinney's N.Y. Consol L Statutes § 94 (2008)); and

WHEREAS, the appellants contend that the open space allocation approved will produce and inequitable or disproportionate distribution of open space and that residents of the existing buildings will be thereby deprived of open space; and

WHEREAS, the Board notes that, as each of the existing buildings is allocated an amount of open space that is in excess of that which would be required under the Zoning Resolution if they were located on separate zoning lots, it cannot be seen how those residents would be deprived of an equitable share of open space by the proposed building; and

WHEREAS, the Board agrees that the open space proposed for the subject site does not violate the open space requirements of the Zoning Resolution; and

WHEREAS, the Board finds that the proposed open space complies with the requirements of ZR §§ 23-142 and 12-10; and

Whether the Proposed Building Violates Open Space Requirements and Height Limitations of the

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Redevelopment Plan

WHEREAS, as discussed above, the Park West Village development was constructed pursuant to the Redevelopment Plan initially approved by the City in 1952; and

WHEREAS, the appellants state that the development of Park West Village continues to be governed by the parameters set forth in the Redevelopment Plan; and

WHEREAS, the appellants contend that the most recently amended version of the Redevelopment Plan limits lot coverage by residential buildings to no more than 19 percent of the Zoning Lot area and that the proposed building would reduce the amount of open space in violation of the Redevelopment Plan; and

WHEREAS, appellants further contend that the Redevelopment Plan limits the height of residential buildings to 150 feet or 20 stories; and

WHEREAS, the appellants further contend that DOB failed to assure that open space on the site and the proposed building height comply with the requirements of the Redevelopment Plan, and, therefore, the Permit should be revoked; and

WHEREAS, the Board notes that the appellants put forth no evidence concerning the square footage of open space allegedly required by the Redevelopment Plan, the open space presently existing on the Zoning Lot, or the open space projected after development of the proposed building, so that the Board is unable to confirm that the proposed building would result in less open space than is required by the Redevelopment Plan; and

WHEREAS, however, the owner states that the Redevelopment Plan is no longer in effect, so that terms therein concerning open space requirements or height limitations are inapplicable to the proposed building; and

WHEREAS, the owner further states that, pursuant to a 1952 redevelopment agreement executed by and between the designated developer of Park West Village and the City of New York (the "Redevelopment Agreement"), the Redevelopment Plan was to remain in effect for a period of forty years from the completion of the project; and

WHEREAS, the Redevelopment Agreement deemed the project completed on such date that the certificates of occupancy were issued for all the residential buildings provided for in the Redevelopment Plan; and

WHEREAS, a certificate of occupancy for the final building provided for in the Redevelopment Plan was issued on July 22, 1966, the owner states that the restrictions imposed by the Redevelopment Agreement therefore expired on July 22, 2006; and

WHEREAS, the expiration of the restrictions set forth in the Redevelopment Agreement was confirmed by the Department of Housing Preservation and Development ("HPD") in a later dated August 7, 2006 from a HPD Deputy Commissioner submitted into the record (the "August 7, 2006 HPD Letter"); and

WHEREAS, the Board notes that the August 7, 2006 HPD Letter confirms that a temporary certificate of occupancy was issued on July 22, 1966 for 765 Amsterdam Avenue, the last residential building of the development, and that the restriction period accordingly ended on July 22, 2006; and

WHEREAS, as the August 7, 2006 HPD Letter establishes that the Redevelopment Plan is no longer in effect, the Board finds that such Plan imposes no continuing legal requirements concerning open space or building height, as alleged by the appellants; and

WHEREAS, the Board further finds that the proposed building is therefore governed solely by the land use restrictions set forth in the Zoning Resolution, as well as the Building Code and other applicable laws and codes; and

Whether the Proposed Supermarket is a Permitted Use in the Zoning District

WHEREAS, portions of the ground floor and cellar levels of the proposed building are proposed to be occupied by a Whole Foods supermarket with approximately 56,000 sq. ft. of floor area; and

WHEREAS, the proposed building is located in a zoning district with a C1-5 overlay, in which a Use Group 6 supermarket is a permitted use; and

WHEREAS, the appellants argue that the proposed food store was improperly classified as a Use Group 6 use and instead ought to have been classified either as a variety store, which is limited to 10,000 sq. ft. of floor area in a C1-5 district, or as a department store, which is a Use Group 10 use that is not allowed in a C1-5 district; and

WHEREAS, the appellants further argue that the introductory text of ZR § 32-15 provides that Use Group 6 consists primarily of retail stores that "provide for a wide variety of local consumer needs" and "have a small service area;" and

WHEREAS, the appellants contend that that the proposed Whole Foods store will draw customers from a wide geographic area and produce heavy pedestrian and vehicular traffic and the store, therefore, is not a Use Group 6 supermarket; and

WHEREAS, the appellants further contend that the location, size and delivery requirements of the proposed store are consistent with those of a department store and are inappropriate and incompatible with the surrounding residential community; and

WHEREAS, in support of this position, the appellants submitted an affidavit from an engineer (the "engineer's affidavit") stating that trucking activity at loading docks on West 97th Street will pose a safety risk to students of the public school located across the street and that a new north-south driveway running across the Zoning Lot from West 100th street to West 97th Street also raises significant traffic and safety issues which ought to have been evaluated before the Permit was approved; and

WHEREAS, the Board notes that DOB has classified Whole Foods as a supermarket under ZR § 32-15 which provides that Use Group 6(A) retail uses include "[f]ood stores, including supermarkets, grocery stores, meat markets or delicatessen stores;" and

WHEREAS, DOB states that Whole Foods stores

in other City locations have all been classified under ZR § 32-15 as Use Group 6 food stores, and

WHEREAS, DOB states that since Whole Foods is a supermarket under ZR § 32-15 and is a permitted use under the zoning resolution in C1-5 districts, the agency had no authority to consider the store size and potential traffic impacts prior to issuance of the Permit (see Lighthouse Hill Civic Ass'n v. City of New York, 275 A.D.2d 322, 323 (2d Dep't 2000); and

WHEREAS, the Board notes that Use Group 6(A) food stores, unlike Use Group 6(A) bakeries and variety stores, are not specifically restricted as to size; and

WHEREAS, the Board further notes that the appellants supplied no evidence to support the claim that the proposed store is not a supermarket under the plain meaning of the text, nor was any evidence submitted supporting the claim that that the store is more appropriately categorized as a department or variety store; and

WHEREAS, the owner states that the Whole Foods supermarket is a permitted Use Group 6 use because the store will be devoted primarily to the sale of food and related items; and

WHEREAS, the owner further states that variety stores and department stores primarily offer an array of non-food items and DOB has not classified any type of food-oriented supermarket, regardless of its size, as a variety store or a department store; and

WHEREAS, the Manhattan Borough President testified that DOB recently classified a Costco store at 32-50 Vernon Boulevard, Queens as a Use Group 10 department store pursuant to ZR § 32-19 although Costco's merchandise is primarily devoted to the sale of food and related items; and

WHEREAS, the Board notes that no evidence was provided demonstrating that the merchandise sold by Costco is analogous to that sold by Whole Foods; and

WHEREAS, the appellants argue that Whole Foods draws customers from a large service area and is therefore not a Use Group 6 use based on the introductory text of ZR § 32-15 describing Use Group 6 uses as retail stores or service establishments with a small service area; and

WHEREAS, the owner contends that the introductory text of ZR § 32-15 is a general descriptive statement concerning Use Group 6 uses that is controlled by the specific list of uses subsequently enumerated, which as noted, includes supermarkets and other types of food stores; and

WHEREAS, the owner further contends that this interpretation is supported by ZR § 32-00, the introductory section of the commercial district regulations, which explains that the Use Groups listed in that section "including each use listed separately therein, are permitted in Commercial Districts as indicated in ZR §§ 32-11 to 32-25. . . " and reflects a legislative judgment that an establishment that falls within one of the uses listed therein is a lawful and valid Use Group 6 use, regardless of its size, its actual service area or the amount of traffic that it generates; and

WHEREAS, the owner argues that such an interpretation of ZR § 32-15 is consistent with the principle of statutory construction that the particular shall control the general and with the rules for construing the Zoning Resolution (see ZR § 12-01; see also McKinney's Consol. L. of NY, Statutes § 238 (2008)); and

WHEREAS, the owner contends that issues raised by the engineer's affidavit are not relevant to the question of whether the proposed Whole Foods store is a valid Use Group 6 use that is permitted in the subject zoning district on an as-of-right basis; and

WHEREAS, notwithstanding the foregoing, the owner states that the loading docks on West 97th Street that will service the Whole Foods store are required under ZR § 36-62 and curb cuts providing access to these loading docks are permitted as-of-right; and

WHEREAS, because no approvals were required for the operation of the loading docks, the owner further states that DOB was not obligated to review the traffic or other impacts associated with the Whole Foods store prior to approving the Permit and, indeed, lacked the legal authority to do so (see Schum v. City of New York, 161 A.D. 519, 520 (1st Dep't 1990)); and

WHEREAS, the owner also submitted an affidavit from its Director of Construction ("director's affidavit") which states that as a result of extensive meetings with community residents, measures have been taken ensure that that vehicles servicing the Whole Foods store will operate safely with minimal neighborhood impacts; and

WHEREAS, the director's affidavit further states that the north-south driveway will not provide vehicular access to the Whole Foods store and instead is designed to provide access to vehicles picking up or dropping off passengers at the existing buildings and that the plans for the driveway have been reviewed and approved by DOB, the Fire Department and the Department of Transportation; and

WHEREAS, the Board finds that the proposed store is a Use Group 6 supermarket which is a permitted use in the subject C1-5 zoning district because: (i) the Zoning Resolution provides that Use Group 6 includes supermarkets without limitation as to size; (ii) DOB has consistently characterized Whole Foods supermarkets as supermarkets; and (iii) the applicant has proffered no evidence to support its characterization of the Whole Foods store as a variety store or department store; and

Whether Environmental Review of the Proposed Building is Required

WHEREAS, the appellants argue that an environmental review pursuant to the State Environmental Quality Review Act ("SEQRA") and the City Environmental Quality Review ("CEQR") provisions, which considered the projects' impact on neighborhood character, light and air, open space and traffic, was required before approval of the Permit; and

WHEREAS, the appellants further argue that the Permit should be revoked because an environmental review of the potential impacts of the proposed building was not undertaken prior to its issuance; and

WHEREAS, the owner contends that under the applicable open space and use provisions of the Zoning

Resolution, the building may be constructed as of right and therefore the approval of the Permit was a ministerial act within the meaning of SEQRA and CEQR and no environmental review under these regulatory provisions was required; and

WHEREAS, SEQRA and/or CEQR review is required when a governmental agency undertakes, funds or approves a defined "action" that may have a significant impact on the environment (see Env. Cons. L. § 8-0109(2); see also 6 NYCRR § 617.1(c)) (2009); and

WHEREAS, an "action" under SEQRA includes projects that "require one or more new or modified approval from an agency or agencies" (see 6 NYCRR 617(b) (1) (2009)) and an "action" under CEQR is define to include "non-ministerial decisions on licensing activities; and

WHEREAS, an "approval" is a discretionary decision by an agency to issue a permit, certificate, license, lease or other entitlement to or otherwise authorize a proposed project or activity" (see Env. Cons. L. § 8-0105) (2009));

WHEREAS, "official acts of a ministerial nature, involving no exercise of discretion," are expressly excluded from the definition of an approval (see ECL § 8-0105(5)(2009)); and

WHEREAS, the owner states that such ministerial acts include the issuance of building permits, when such issuance is "predicated solely on the applicant's compliance or noncompliance" with local building codes (see 6 NYCRR § 617.5(c) (19)(2009)); and

WHEREAS, the owner further states that, in numerous instances, the courts have held that DOB's issuance of as-of-right construction permits is not subject to CEQR, which implements SEQRA in new York City SEQRA and CEQR (see e.g., Lighthouse Hill Civic Ass'n v. City of New York, 275 A.D.2d 322, 323 (2d Dep't 2000); Schum v. City of New York, 161 A.D. 519, 520 (1st Dep't 1990), Citizens for Preservation of Windsor Terrace v. Smith, 122 A.D. 2d 827, 828 (2d Dep't 1986); and Herald Square South Civic Ass'n v. Consol. Edison Co. of New York, 2003 N.Y. Slip Op. 515755U (Sup. Ct. N.Y. Co. May 24, 2003), aff'd 307 A.D.2d 213 (1st Dep't 2003)); and

WHEREAS, the Board finds that environmental review pursuant to SEQRA and/or CEQR to consider the projects' impact on neighborhood character, light and air, open space and traffic was not required because approval of the Permit was a ministerial act within the meaning of SEQRA and CEQR; and

WHEREAS, the Board finds that the instant appeal presents no evidence that DOB violated any law or regulation; and

WHEREAS, accordingly, the Board concludes that the plans for construction of the proposed building under New Building Permit No. 104464438 meet the requirements for open space under ZR §§ 23-142 and 12-10, that the proposed supermarket is a permitted use within the subject zoning district and, because the Proposed building was therefore permitted as of right, no environmental review of the Proposed building's impacts was required; and

Therefore it is Resolved, that the instant appeal, seeking a reversal of the determination of the Manhattan Borough Commissioner, dated May 2, 2008, to uphold the approval of New Building Permit No. 104464438, and the revocation of said Permit, is hereby denied.

Adopted by the Board of Standards and Appeals, February 3, 2009.

A true copy of resolution adopted by the Board of Standards and Appeals, February 3, 2009.
Printed in Bulletin No. 6, Vol. 94.

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