

152-14-BZ

CEQR #15-BSA-020K

APPLICANT – Sheldon Lobel, P.C., for Ashawagh Cottage, LLC., owner.

SUBJECT – Application June 26, 2014 – Variance (§72-21) to permit the construction of a new community facility building at the premises which would contain a for-profit school, the school at Fillmore Place for children ages two through six. R6B zoning district in a historic district.

PREMISES AFFECTED – 673 Driggs Avenue, Block 2382, Lot 3, Borough of Brooklyn.

COMMUNITY BOARD #1BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Chanda.....4

Negative:.....0

Absent: Commissioner Montanez.....1

THE RESOLUTION –

WHEREAS, the decision of the Department of Buildings (“DOB”), dated September 16, 2016, acting on DOB Application No. 320878305, reads in pertinent part:

- “1. Proposed plans are contrary to ZR § 23-153 in that the proposed Floor Area Ratio (FAR) exceeds the maximum permitted;
2. Proposed plans are contrary to ZR § 23-662(a) in that the proposed street wall height exceeds the maximum base height permitted”; and

WHEREAS, this is an application under ZR § 72-21 to permit, on a site in an R6B zoning district and the Fillmore Place Historic District, the development of a three-story, plus cellar, community-facility building that does not comply with applicable floor area ratio and maximum base height regulations, contrary to ZR §§ 23-153 and 23-662; and

WHEREAS, this application is brought on behalf of the School at Fillmore Place, a proposed private, for-profit pre-school for children ages two through five (the “School”), which the applicant represents will be regulated by Article 47 of the New York City Health Code, which regulates non-residential-based child care centers for children under six years of age; and

WHEREAS, a public hearing was held on this application on December 13, 2016, after due notice by publication in *The City Record*, with continued hearings on April 26, 2016, July 19, 2016, and October 14, 2016, and then to decision on December 13, 2016; and

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

WHEREAS, Community Board 1, Brooklyn,

recommends disapproval of this application on the basis that the application does not meet any of the findings under ZR § 72-21; and

WHEREAS, New York City Council Member Antonio Reynoso submitted a letter, dated April 27, 2016, recommending disapproval of this application on the basis that, *inter alia*, the applicant has not met the findings pursuant to ZR § 72-21 subsections (a) and (c); and

WHEREAS, in addition, several members of the community (collectively, with Community Board 1 and Council Member Reynoso, the “Opposition”) submitted written and oral testimony recommending disapproval of this application; and

WHEREAS, the subject site is located on the southeast corner of Driggs Avenue and Fillmore Place, in an R6B zoning district within the Fillmore Place Historic District, in Brooklyn; and

WHEREAS, the site has approximately 22 feet of frontage along Driggs Avenue, 75 feet of frontage along Fillmore Place, 1,661 square feet of lot area and is vacant; and

WHEREAS, the applicant originally proposed to construct a three-story community-facility building with 4,737 square feet of floor area, a floor area ratio (“FAR”) of 2.85 and a maximum base height of 42’-1”; and

WHEREAS, in the course of hearing, and in response to comments made by the Board and the Opposition, the applicant revised the proposal and now proposes to construct a three-story, with cellar, community-facility building with 4,664 square feet of floor area, an FAR of 2.81 and a base wall height of 42’-1”; and

WHEREAS, the proposed cellar will contain one classroom with a capacity of 14 children, an office with a kitchenette, storage, restrooms and mechanical space; the proposed first floor features the lobby, two classrooms with a total capacity of 27 children, kitchenettes and restrooms; the second floor features a classroom for 18 children, an outdoor rooftop play area, an office, a kitchenette and restrooms; the third floor features a classroom accommodating 17 children, an office, a kitchenette and restrooms; and the roof features an outdoor play area with a Fire Department access landing, a vestibule, multipurpose room and an elevator control room; and

WHEREAS, at the subject site, the maximum floor area permitted is 3,322 square feet (2.0 FAR), pursuant to ZR § 23-153, and the maximum base height permitted is 40 feet, pursuant to ZR § 23-662; and

WHEREAS, the School states that the waivers sought are necessary to achieve its programmatic needs, namely the classroom space sufficient to provide morning and afternoon pre-school sessions, each with 77 children in attendance, and outdoor play space; and

152-14-BZ

CEQR #15-BSA-020K

WHEREAS, pursuant to ZR §72-21, the Board must make the following findings in order to vary provisions of the Zoning Resolution:

- (a) that there are unique physical conditions, including irregularity, narrowness or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to and inherent in the particular #zoning lot#; and that, as a result of such unique physical conditions, practical difficulties or unnecessary hardship arise in complying strictly with the #use# or #bulk# provisions of the Resolution; and that the alleged practical difficulties or unnecessary hardship are not due to circumstances created generally by the strict application of such provisions in the neighborhood or district in which the #zoning lot# is located;
- (b) that because of such physical conditions there is no reasonable possibility that a #development#, #enlargement#, extension, alteration or change of #use# on the #zoning lot# in strict conformity with the provisions of this Resolution will bring a reasonable return, and that the grant of a variance is therefore necessary to enable the owner to realize a reasonable return from such #zoning lot#; this finding shall not be required for the granting of a variance to a non-profit organization;
- (c) that the variance, if granted, will not alter the essential character of the neighborhood or district in which the #zoning lot# is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare;
- (d) that the practical difficulties or unnecessary hardship claimed as a ground for a variance have not been created by the owner or by a predecessor in title; however, where all other required findings are made, the purchase of a #zoning lot# subject to the restrictions sought to be varied shall not itself constitute a self-created hardship; and
- (e) that within the intent and purposes of this Resolution, the variance, if granted, is the minimum variance necessary to afford relief; and to this end, the Board may permit a lesser variance than that applied for; and

WHEREAS, the applicant represents that the

small size of the subject lot and presence of encroachments from adjacent buildings along its western boundary and a subsurface rubble stone foundation create practical difficulties or necessary hardship in strictly complying with the bulk provisions of the Zoning Resolution, namely that these unique features necessitate an elaborate cantilevered structural system that would result in a narrow floor plate with a column grid in what would normally be a column-free building; and

WHEREAS, the encroachments—protruding between 9'-1/2" and 2'-0" into the subject lot—further decrease the effective size of the lot; and

WHEREAS, in support of its contention that the size of the subject lot is a unique condition sufficient to meet ZR § 72-21(a), the applicant submitted a study of properties within an 800-foot radius of the subject site demonstrating that, of 52 tax lots in the same R6B zoning district, only one of seven vacant tax lots has a smaller lot area, and the applicant notes that this smaller tax lot is subject to a deed restriction limiting its use to open space whereas the subject lot has no such restriction; and

WHEREAS, the applicant further states that, as a result of the construction methods necessitated by the encroachments and subsurface rubble, 57 percent of an as-of-right building's floor space would contain non-programming space—including stairs, an elevator shaft, mechanical space and adult toilets—leaving only 43 percent of the building for the School's programming and that these constraints would prevent the School from meeting its programming needs; and

WHEREAS, the applicant represents that the proposed waivers for floor area and base height would allow the School to alleviate the site's space constraints by enabling an increase in available programming space to 50 percent of the gross area of the building;

WHEREAS, the applicant further represents that, on the roof, the waiver for base height allows the School to provide, as requested, unobstructed rooftop access for the Fire Department—including unobstructed passage across the building parapet, perimeter fence or other obstructions, and a safe landing—pursuant to Fire Code § 504.4.1 as requested, while situating the multipurpose room and fresh-air unit in such a way as to maximize the School's rooftop outdoor play area; and

WHEREAS, the Fire Department reviewed the School's revised plans and, by letter dated July 13, 2016, stated that it had no objection to the application; and

WHEREAS, in a Resolution dated September 10, 2014, Community Board 1 states that the size of the subject lot is "similar" to others on the block, but fails

152-14-BZ

CEQR #15-BSA-020K

to provide any data that would contradict or undermine the uniqueness study presented to and reviewed by the Board; and

WHEREAS, the Board acknowledges that, because of their presumed beneficial effect on the community, educational institutions are entitled to deference under the law of the State of New York as to zoning and their ability to rely on programmatic needs to support variance applications; and

WHEREAS, specifically, as held in *Cornell University v. Bagnardi*, 68 N.Y.2d 583 (1986), an educational institution's application is to be permitted unless it can be shown to have an adverse effect upon the health, safety or welfare of the community, and general concerns about traffic and disruption of the residential character of a neighborhood are insufficient grounds for the denial of an application; and

WHEREAS, based on the above, the Board finds that the unique conditions of the subject site and the programmatic needs of the School create an unnecessary hardship and practical difficulty in developing the premises in compliance with the applicable zoning regulations; and

WHEREAS, the applicant states that, per ZR § 72-21(b), there is no reasonable possibility that the development of the site in conformance with the Zoning Resolution will bring a reasonable return; and

WHEREAS, the Board notes that because the School is proprietary and, thus, operates as a for-profit institution, the Board must evaluate the finding set forth in ZR § 72-21(b); and

WHEREAS, the applicant provided a financial analysis for (1) an as-of-right community-facility building (the "As-of-Right Development") and (2) the subject proposal; and

WHEREAS, the applicant represents that only the subject proposal would provide a reasonable return; and

WHEREAS, the applicant represents that the As-of-Right Development would have a height of three stories, 3,125 square feet of floor area (1.88 FAR), and a base height of 35'-9"; and

WHEREAS, the applicant represents that the As-of-Right Development would only allow programming for four classrooms, each with a capacity of between 8 and 10 children and accommodating a total of 38 children, with a limited outdoor play area at grade and no rooftop play area; and

WHEREAS, in contrast, the subject proposal provides five classrooms, which can accommodate a total of 77 children per session, along with rooftop play areas at both the second floor and on the roof, which the applicant represents are significant benefits for a pre-school facility; and

WHEREAS, the financial analysis provided indicates that while the total development cost for the subject proposal is \$1,032,325 greater than the

development costs for the As-of-Right Development, the As-of-Right Development does not provide space for a sufficient number of students to allow the School to realize a positive return and the subject proposal, with five larger classrooms and two rooftop play areas, contains sufficient value to be financially feasible; and

WHEREAS, therefore, based upon its review of the applicant's submissions, the Board finds that, because of the subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements will provide a reasonable return; and

WHEREAS, the applicant represents that the surrounding area contains a variety of manufacturing, commercial and residential uses and therefore will not alter the essential character of the neighborhood, will not substantially impair the appropriate use or development of adjacent property and will not be detrimental to the public welfare, in accordance with ZR § 72-21(c); and

WHEREAS, in addition, the Board notes that the School's proposed community-facility use is allowed as-of-right in an R6B zoning district under ZR § 22-10; and

WHEREAS, the Opposition expressed concerns for public safety arising from the subject proposal including the narrowness of Fillmore Place and its capacity to support the traffic resulting from the proposed use, concerns about parking availability in the area, the presence of a bike lane and bus routes on Driggs Avenue, as well as concerns about Fire Department access to the building; and

WHEREAS, with respect to the subject site's location within the Fillmore Place Historic District, the applicant represents that the proposal will not affect the historical character of the area; and

WHEREAS, the applicant submitted Certificate of Appropriateness No. 16-1742, issued by the Landmarks Preservation Commission ("LPC") as amended on November 17, 2016, approving construction in connection with the subject proposal; and

WHEREAS, at the Board's request and in response to concerns from the Opposition that a play roof would create excess noise, the applicant submitted a study of potential noise from the School's proposed rooftop play areas; and

WHEREAS, the rooftop-noise study submitted indicates, and the Board accepts, that the School's proposal has no potential to create a noise nuisance—more than 45 dB(A) indoors and 70–75 dB(A) outdoors—for outdoor or indoor closed-window conditions because future noise levels are not anticipated to exceed 65 dB(A); and

WHEREAS, the applicant also submitted a transportation study, dated November 2016, in response to the Board's request and in order to address concerns

152-14-BZ

CEQR #15-BSA-020K

raised from the Opposition regarding current traffic in the area and the potential for the operation of a pre-school at the subject location to exacerbate existing conditions; and

WHEREAS, the transportation study concludes, and the Board accepts, that the School's proposal would cause "minimal" increases in pedestrian and vehicular traffic to the area with the majority of arrivals to and departures from the site occurring by foot; and

WHEREAS, the New York City Department of Transportation ("DOT") School Safety Division also reviewed the School's proposal and, by letter dated August 4, 2016, states that it has no objection to the approval of this application; and

WHEREAS, additionally, the School agreed to adopt an Operational Plan in further response to the Opposition's concerns about traffic and in order to minimize adverse effects, which includes 15-minute-staggered arrival and departure times for students with a staff monitor on duty to facilitate safe maneuvering and compliance with the School's procedures—including discouraging congregating, standing, double-parking and leaving strollers outside the School while also ensuring that vehicular drop-offs and pick-ups occur on the Driggs Avenue frontage, rather than Fillmore Place; and

WHEREAS, further, in a letter dated November 13, 2016, the Director of the School represented that, based on her experience at Brooklyn Schoolhouse, a similar pre-school located in Clinton Hill with an enrollment of 28 students under the age of four, 90 percent of the students of the School will arrive and depart on foot and only 10 percent are expected to arrive by car; and

WHEREAS, the applicant also agreed to seek a curbside no-standing zone along its Driggs Avenue frontage from DOT; and

WHEREAS, in light of the foregoing, the Board finds that the requested waivers will not alter the essential character of the neighborhood or district, impair the use or development of adjacent property, nor be detrimental to the public welfare; and

WHEREAS, with regards to ZR § 72-21(d), the applicant represents that the unnecessary hardship encountered by compliance with a strict application of the Zoning Resolution is inherent in the subject site's narrow width, shallow depth, small lot size, and encroachments from adjacent buildings and was not caused by either the School, the owner, or a predecessor in interest; and

WHEREAS, Community Board 1 contends, without evidentiary support, that the hardship is self-created, because it is "most likely" that the purchase price took into account an expectation of obtaining a zoning change or use variance; and

WHEREAS, the Board notes that the text of ZR

§ 72-21(d) itself states that the purchase of property "shall not itself constitute a self-created hardship"; and

WHEREAS, therefore, the Board finds that the practical difficulties or unnecessary hardship burdening the site were not self-created; and

WHEREAS, the applicant represents that the subject proposal is the minimum necessary to afford relief, consistent with ZR § 72-21(e), because it is modest in scope and requires only the waivers necessary to effectively develop an underutilized site that has been vacant for 47 years; and

WHEREAS, in support, the applicant cites to the provided financial analysis, demonstrating that the capitalized value of the subject proposal is only \$8,119 more than its total development costs, representing a positive return of 0.1 percent; and

WHEREAS, therefore, the Board finds, in accordance with ZR § 72-21(e), that the subject proposal is the minimum necessary to afford the applicant 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 a Type I action pursuant to 6 NYCRR, Part 617.4; and

WHEREAS, the Board conducted an environmental review of the proposed action and documented relevant information about the project in the Final Environmental Assessment Statement ("EAS") CEQR No. 15-BSA-020K, dated October 11, 2016; 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; Open Space; Shadows; Historic and Cultural Resources; Urban Design and Visual Resources; Natural Resources; Hazardous Materials; Water and Sewer Infrastructure; Solid Waste and Sanitation Services; Energy; Transportation; Air Quality; Greenhouse Gas Emissions; Noise; Public Health; Neighborhood Character; and Construction; and

WHEREAS, the LPC conducted an environmental review, dated August 3, 2015, finding that while the site is of no archaeological significance, it is located within a designated historic district and may be eligible for National Register Listing; and

WHEREAS, the New York City Department of Environmental Protection's ("DEP") Bureau of Environmental Planning and Analysis reviewed the project for potential hazardous materials and noise; and

WHEREAS, by letter dated August 12, 2015, DEP reviewed and accepted the March 2015 Environmental Assessment Statement ("EAS") and the April 2013 Phase I Environmental Site Assessment Report ("Phase I"), recommending that a Phase II Environmental Site Assessment was necessary based on

152-14-BZ

CEQR #15-BSA-020K

the historical on-site or surrounding-area land uses; and
WHEREAS, by letter dated December 23, 2015, DEP reviewed and accepted the October 2015 Phase II Site Investigation Work Plan ("Phase II Work Plan") and the August 2015 Health and Safety Plan ("HASP"); and

WHEREAS, by letter dated July 14, 2016, DEP reviewed and provided comments regarding noise analysis; and

WHEREAS, by letter dated August 2, 2016, DEP reviewed and accepted the June 2016 Phase II Site Investigation Report ("Phase II Report"), July 2016 Remedial Action Plan ("RAP") and the June 2016 Revised Construction Health and Safety Plan ("CHASP"); and

WHEREAS, by letter dated October 14, 2016, DEP reviewed the backup noise data and traffic-count data logs and found that the proposed project would not result in potential significant adverse noise impacts; and

WHEREAS, no other significant adverse 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; and

Therefore, it is Resolved that the Board of Standards and Appeals issues a Type I Negative Declaration, with conditions as stipulated below, 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, on a site in an R6B zoning district, the development of a three-story, plus cellar, community-facility building, contrary to ZR §§ 23-153 and 23-662 *on condition* that any and all work will substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received September 22, 2016"-Nineteen (19) sheets, and letter from Brooklyn Schoolhouse Founder and Director dated "November 17, 2016"-One (1) sheet; and *on further condition*:

THAT the following shall be the bulk parameters of the building: a maximum of 4,664 square feet of floor area (2.85 FAR) and a maximum base height of 42'-1", as illustrated on the BSA-approved plans;

THAT pick-up and drop-off shall occur on the Driggs Avenue frontage only;

THAT the School shall implement the following

procedures (the "Operational Plan"):

- a 15-minute-staggered arrival and departure procedure;
- provide a staff member on duty outside the School to escort children arriving by car to the school entrance, manage pick-ups and drop-offs and avoid conflicts with bicycles and pedestrians;
- seek and obtain a School No-Standing Zone on Driggs Avenue from the New York City Department of Transportation;
- prohibit standing and double-parking on Fillmore Place;
- discourage parents and caregivers from congregating or leaving strollers outside the School;
- notify parents and caregivers of arrival-and-departure procedures at orientation sessions, in parent handbook and on school website;
- remind parents and caregivers of procedures as needed;

THAT upon opening, the School shall submit its School No-Standing Zone to the Department of Transportation for final review and assessment;

THAT any violation of this Resolution, including the School's Operational Plan, incorporated herein, shall constitute a violation of this Resolution, pursuant to ZR § 72-22, and may constitute the basis for denial or revocation of a building permit or certificate of occupancy and for all other applicable remedies;

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

THAT the above conditions shall appear on the Certificate of Occupancy;

THAT a Certificate of Occupancy shall be obtained within four (4) years, by December 13, 2020;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed Department of Buildings and other jurisdiction objection(s) only;

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

THAT the Department of Buildings shall ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction.

Adopted by the Board of Standards and Appeals, December 13, 2016.

A true copy of resolution adopted by the Board of Standards and Appeals, December 13, 2016.

Printed in Bulletin No. 51, Vol. 101.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

