

2017-190-BZ
CEQR #17-BSA-132Q

APPLICANT – Fox Rothschild LLP, for Catherine Sheridan Housing Development Fund Company, Inc., owner.

SUBJECT – Application May 25, 2017 – Variance (§72-21) to permit the development of a 7-story building containing 92 affordable independent residences for seniors and a ground floor senior center contrary to ZR §§23-155 & 24-11 (maximum permitted FAR); ZR §24-33 (permitted obstruction in the required rear yards) and ZR §23-622 (maximum height and setbacks). R6B zoning district.

PREMISES AFFECTED – 23-11 31st Road, Block 569, Lot 17, Borough of Queens.

COMMUNITY BOARD #1Q

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown and Commissioner Sheta.....4
Negative:0
Abstain: Commissioner Scibetta.....1

THE RESOLUTION –

WHEREAS, the decision of the Department of Buildings (“DOB”), dated September 7, 2017, acting on Application No. 420659638 reads in pertinent part:

1. ZR 23-155 [...]: Proposed Building does not comply with maximum permitted floor area ratio per ZR 23-155 [...] and requires approval from the BSA;
2. [...]
3. ZR 23-662: Proposed Building does not comply with maximum height and setback regulations per ZR 23-662 and requires approval from the BSA; and

WHEREAS, this is an application pursuant to ZR § 72-21 to permit, on a site located within an R6B zoning district, the construction of a six-story Use Group 2 affordable independent residence for seniors (“AIRS”) that does not comply with the zoning regulations relating to floor area ratio and maximum height and set back, contrary to ZR §§ 23-155 and 23-662; and

WHEREAS, this application is filed on behalf of Catherine Sheridan Housing Development Fund Company, Inc. (the “Applicant”), a subsidiary of Catholic Charities Progress of Peoples Development Corporation, the non-profit developer of affordable housing for its parent entity, Catholic Charities Brooklyn and Queens (“Catholic Charities”); and

WHEREAS, Catholic Charities—whose mission is to provide housing and shelter for low-income families, single adults, the elderly and special needs populations supported by social services—has developed over 3,500 units of social service integrated low-income and senior housing in Brooklyn and

Queens since 1975 that it operates through subsidiaries; and

WHEREAS, a public hearing was held on this application on September 26, 2017, after due notice by publication in *The City Record*, with continued hearings on January 30, 2018, and March 20, 2018, and then to decision on April 10, 2018; and

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

WHEREAS, Community Board 1, Queens, recommends approval of this application; and

WHEREAS, by letters dated June 20, 2017, and January 23, 2018, New York City Councilmember Costa Constantinides expressed his support of this application, noted that the “demand for affordable housing has reached a fever pitch” and reported that in his four years in office, the number one constituent request he has received, especially from seniors, is for more affordable housing; and

WHEREAS, Councilmember Constantinides also stated that, according to 2016 estimates, approximately 20,000 seniors are seeking affordable housing in the subject City Council District, that the average waiting period for senior affordable housing is 7 years and opined that the City must act quickly to meet the housing needs of its growing senior population; and

WHEREAS, by letter dated January 8, 2018, the Service Employees International Union (“SEIU”) 32BJ, a labor union representing building service workers in New York City, stated that, while they have no objection to the subject proposal, they oppose the expansion of the *Cornell* Doctrine, discussed further below; and

WHEREAS, by letter dated January 26, 2018, LiveOn NY, an organization that advocates for policy changes furthering the interests of senior centers and agencies, expressed its support for this application, particularly with respect to the proposal to include social service space in the building, which, they said, “demonstrates true recognition of what seniors need to age and thrive in their community, as most seniors desire to do”; and

WHEREAS, the Board was also in receipt of three form letters in support of the application and one form letter in opposition, citing a concern that the proposed height of the building will block neighbors’ views; and

WHEREAS, the subject site is located on the northeast corner of 31st Road and 23rd Street, in an R6B zoning district, in Queens; and

WHEREAS, the site has approximately 250 feet of frontage along 31st Road, 87 feet of frontage along 23rd Street, 25,576 square feet of lot area and is currently vacant; and

WHEREAS, the Board has exercised jurisdiction over the subject site since July 19, 1977, when, under

2017-190-BZ
CEQR #17-BSA-132Q

BSA Cal. No. 237-77-BZ, the Board granted a special permit, pursuant to ZR § 73-451, allowing the construction and maintenance of an off-site parking facility accessory to a multiple dwelling located at 31-41 23rd Street (Block 568, Lot 12), Queens, on condition that the parking facility be restricted to parking accessory to the multiple dwelling building located at 31-41 23rd Street; there be no building constructed at the site; that the lot be held in single ownership with 31-41 23rd Street, to which the parking was accessory; and that substantial construction be completed within one year; and

WHEREAS, by letter dated October 12, 2017, a letter of substantial compliance was issued permitting a change in use of the multiple dwelling located at 31-41 23rd Street from Use Group 2 Class “A” multiple dwelling units and Use Group 4 community facility to Use Group 2 AIRS, a use permitted as-of-right at the subject site and for which, pursuant to ZR § 25-252, no accessory off-street parking spaces are required; accordingly, the special permit granted to the subject site was surrendered; and

WHEREAS, at the subject site, a maximum floor area ratio of 2.20 (56,267 square feet of floor area) is permitted pursuant to ZR § 23-155; a maximum base height of 40 feet and a maximum building height of 50 feet are required pursuant to ZR § 23-662(a); and, above the maximum base height, setbacks of at least 15 feet are required from both 31st Road and 23rd Street pursuant to ZR § 23-662(c)(1); and

WHEREAS, the Applicant proposes to redevelop the site with a six-story building containing 92 units of affordable independent residences for seniors, plus one superintendent’s unit for a total of 93 units, 74,274 square feet of floor area including 6,328 square feet of accessory space on the ground floor for the provision of social and welfare services primarily for the senior residents, a floor area ratio (“FAR”) of 2.90 and a building height of 61’-8” with no setback from either 31st Road or 23rd Street; and

WHEREAS, accordingly, the Applicant seeks an increase in the FAR permitted at the site by 0.70, an 18,007 square foot increase in the residential floor area permitted, a 21’-8” increase in the maximum base height permitted, an 11’-8” increase in the maximum building height permitted and a waiver of the required 15 foot setbacks; there are no density regulations applicable to AIRS units and, thus, no waiver of density has been requested; and

WHEREAS, the Applicant submits that the waivers are required to overcome a high water table that precludes the provision of a cellar and to facilitate the development of a building that will be in context with the neighborhood as well as to provide a sufficient number of affordable residences for seniors in a single development project that satisfies public financing

criteria and related regulatory and policy guidelines; and

WHEREAS, primarily, however, the Applicant relies on an extension of the deference afforded educational and religious institutions under the law of the State of New York as to zoning, known as the *Cornell* Doctrine, that obviates the need for the Board to find a “unique physical condition,” as set forth in ZR § 72-21(a), to not-for-profit affordable developers seeking bulk waivers to facilitate the development of projects that provide 100 percent affordable housing to low-income earners for the life of the building; and

WHEREAS, *Cornell University v. Bagnardi*, 68 NY2d 583 (1986) holds that, while zoning boards retain discretion, educational or religious institutions’ land use applications are generally to be granted unless they can be shown to have a net negative impact on the health, safety or welfare of the community, though general concerns about traffic and disruption of the residential character of the neighborhood, for instance, are insufficient grounds upon which to deny such applications; and

WHEREAS, the Applicant submitted a thorough analysis of the origins of the *Cornell* Doctrine demonstrating a natural link between public policies aimed at protecting houses of worship and schools and those aimed at facilitating the development of housing for low-income earners, seniors and the formerly homeless; and

WHEREAS, in particular, the Applicant asserts that the provision of affordable housing, much like that of educational institutions and houses of worship, is in furtherance of the public health, safety, welfare and morals and a fundamental interest of the state, as evidenced by a 1965 amendment to the New York State Constitution that authorized the legislature to provide for “low rent housing and nursing home accommodations for persons of low income as defined by law,” New York Constitution, article XVIII, § 1; and

WHEREAS, the Applicant submits that both New York City and State have long recognized the importance of accessibility to safe and high-quality affordable housing, as further evidenced by the New York State Tenement House Act of 1901, which banned the construction of dark and poorly ventilated tenement buildings and required that newly constructed tenement buildings be built with outward facing windows in every room, open courtyards, indoor toilets and fire safeguards; the Multiple Dwelling Law of 1929, which established proper housing standards requiring sufficient light, air, sanitation and protection from fire hazards essential to the public welfare; the New York City Housing Authority, created in 1934 to provide housing for low- and moderate-income residents and currently the largest public housing authority in North America; the Mitchell-Lama Housing Program, created

2017-190-BZ
CEQR #17-BSA-132Q

by the New York State Legislature in 1955 to provide affordable rental and cooperative housing to moderate- and middle-income residents; and the Loft Law, an article of the Multiple Dwelling Law enacted in 1982 requiring residential conversions of commercial and manufacturing buildings to comply with minimum housing standards in order to ensure the health and safety of the buildings' residential tenants; and

WHEREAS, in the 1980s, the federal government expanded the availability and use of Section 8 Housing Choice Vouchers, utilized by very low-income families, the elderly and the disabled to acquire safe housing in the private housing market, and introduced the Low-Income Housing Tax Credit program, which gives state and local agencies authority to issue tax credits for costs associated with the acquisition, rehabilitation or construction of rental housing for low-income earners, while New York City Mayor Edward Koch's administration initiated and enforced tax foreclosures on properties that were one year or more in tax arrears in an effort to increase public revenue after the fiscal crisis of 1977—an act that made the City of New York the largest owner of land within the City of New York with title to more than 100,000 vacant and partly occupied apartments—and eventually designated \$5.1 billion in city and federal funds to rebuild entire neighborhoods as part of Koch's Ten-Year Affordable Housing Plan (1986-1996); and

WHEREAS, in the 1990s, New York City Mayors David Dinkins and Rudolph Giuliani's administrations extended the City's commitment to Mayor Koch's affordable housing plan, which led to the rehabilitation and development of over 180,000 units between 1987 and 2000; and

WHEREAS, New York City Mayor Michael Bloomberg's administration also made commitments to creating and preserving affordable housing with the New Housing Marketplace Plan (July 2003), which originally committed \$3.4 billion to build and preserve 68,000 affordable housing units by 2008, but doubled its goal in February 2006 with \$7.5 billion dedicated to build and preserve 165,000 affordable housing units over the next ten years; and

WHEREAS, in 2014, current New York City Mayor Bill de Blasio introduced the Housing New York, a five-borough ten-year plan aiming to create and preserve 200,000 affordable housing units by 2024 through, among other initiatives, encouraging the development of affordable housing on underutilized public and private sites, promoting housing for seniors and the formerly homeless and creating the Mandatory Inclusionary Housing program, which, per ZR § 24-92, was “established to promote the creation and preservation of housing for residents with varied incomes in redeveloping neighborhoods and to enhance neighborhood diversity and thus *to promote the general*

welfare,” (emphasis added) and requires that a certain proportion of new housing developed in connection with certain zoning actions be permanently affordable; and

WHEREAS, in spite of these professed policy goals, the Applicant asserts that the City of New York is in the midst of an affordable housing crisis due to, among other things, incredible population growth; a demand for low- and moderate-income affordable housing units that outpaces the supply of those units and, relatedly, a rise in residential rents that outpaces income growth; the steady decrease in the number of rent controlled and rent stabilized (collectively, “rent regulated”) units; and the aversion of residents located near proposed low-income affordable housing developments to such projects out of fear that such developments will decrease area property values and adversely affect the neighborhood's quality of life, a response that often leads to the abandonment of those projects; and

WHEREAS, the Applicant notes that the New York City Rent Guidelines Board, charged with establishing rent increases for the dwelling units subject to the Rent Stabilization Law, found that, since 1994, nearly 250,000 units of rental housing have been removed from rent regulation protection, resulting in a net loss of 16 percent of the total stock of rent regulated affordable housing units from 1994 to 2012; in addition, many buildings, for which the regulatory requirement to be available at affordable rents has expired, have opted out of affordability programs and opted, instead, to pursue market rate or homeownership options, leading to a loss of another 68,000 units of affordable housing from the four largest subsidy programs; and

WHEREAS, in Queens, in particular, the Applicant submits that the fair market monthly rent for a two-bedroom unit in 2016 necessitated an hourly wage of \$30.21 to be considered affordable, but the estimated hourly wage in the area was, in fact, \$17.49, and in the neighborhood of Astoria, in Queens, rents in the area have increased by 26.7 percent from 2000 to 2010-2014 (compared to a 0.7 percent increase during the previous decade) while the average household income in Astoria has increased by only 5 percent in that same period, demonstrating the chasm between wages and housing affordability in New York City; and

WHEREAS, the Applicant emphasizes that the crisis has disproportionately affected New York City's senior residents, 60 years and older, a growing demographic that often relies on a fixed income and nearly one-third of which currently pay more than 50 percent of their income on housing; and

WHEREAS, in furtherance of their submission that the provision of affordable housing for low-income earners is generally, like education and free exercise of

2017-190-BZ
CEQR #17-BSA-132Q

religion, in furtherance of the public health, safety, welfare and morals, the Applicant notes that when residents have to spend a large percentage of their income on housing, less money is available for those residents' other basic living needs like food or healthcare, which can lead to negative health outcomes, particularly for seniors; the insufficient supply of low-income affordable housing also results in overcrowded housing and familial instability, necessitating frequent moves and increases in the rate of homelessness; and

WHEREAS, the Applicant submits that providing low-income affordable housing units sufficient to meet the demand, thereby meeting residents' most basic need for shelter, enables residents to more actively participate in the local economy, acquire other life essentials like nutritious food and medicine, access more stable employment opportunities and altogether improves residents' quality of life; and

WHEREAS, when such housing is provided by mission-based not-for-profit institutions, in particular, the Applicant avers that these positive outcomes are more assured because of the developer's focus on the residents rather than financial profit and because the mission of the not-for-profit housing developer is to build, manage and maintain affordable housing and not package it for resale or for the building's future "upside" potential, as would be the goal for a for-profit developer; and

WHEREAS, the Applicant submits that additional methods of facilitating the development of affordable housing for low-income residents, such as the proposed extension of the *Cornell* Doctrine herein, are necessary to close the gap between the supply and demand for low-income affordable housing since, unlike market rate or mixed-income (market rate units combined with affordable units at varying degrees of affordability) housing development projects, low-income affordable housing can only be developed in reliance on government grants and subsidies and on adequate unit counts that facilitate economies of scale; and

WHEREAS, in the letter expressing their opposition to this expansion of the *Cornell* Doctrine, SEIU 32BJ states that there is no precedent for the expansion of the doctrine to cover affordable housing, that New York State courts have rejected efforts to expand the doctrine to buildings owned by religious and educational institutions "that are used for auxiliary purposes," and that the extension of the doctrine would create a "slippery slope," specifically, in allowing deference to for-profit developments in much the same way that educational deference under the *Cornell* Doctrine is available to both publically- and privately-funded schools; and

WHEREAS, while the Board recognizes that the record does not reflect any instance in which New York State courts have declined to extend or apply the

Cornell Doctrine to a 100 percent low-income affordable housing development, the Board notes instances in which New York State courts have applied the doctrine with the flexibility and factual specificity inherent in land use decisions including *Matter of Unitarian Universalist Church of Central Nassau v. Shorten*, 63 Misc 2d 978 (Sup Ct Nassau County 1970) (ruling that a day care center housed in an existing church, but operated by a separate non-profit corporation, was religious activity protected by the First Amendment because it shared a site with a house of worship and did not require a special permit, the application for which was denied, both because the Village zoning ordinance necessitating the special permit conflicted with and hindered State law and policy that favored the creation of facilities suitable for the care of pre-school and primary school aged children); *McGann v. Village of Old Westbury*, 186 Misc 2d 661 (Sup Ct Nassau County 2000) *affd* 293 AD2d 581 (2d Dept 2002) (off-site Roman Catholic cemetery constituted a "religious use" entitled to deference based on, among other things, evidence that cemeteries are places of worship in their own right in Roman Catholic theology); *East Hampton Library v. Zoning Board of Appeals of Village of East Hampton*, 31 Misc 3d 1231(A), 2011 NY Slip Op 50921(U) (Sup Ct Suffolk County 2011) (land use applications filed to facilitate a library operated by the University of the State of New York were entitled to educational deference both because the library was chartered by an institute of higher education and because it provided numerous instructional programs, classes, lectures and lessons, which are all educational in nature); and

WHEREAS, the Board additionally notes instances in which the Board, itself, has extended the *Cornell* Doctrine to permit the enlargement of hospitals associated with degree-granting educational institutions, including New York Presbyterian Hospital (BSA Cal. No. 325-12-BZ) (June 11, 2013), Mount Sinai Hospital (BSA Cal No. 170-13-BZ) (September 10, 2013), Memorial Hospital for Cancer and Allied Diseases (BSA Cal. No. 183-11-BZ) (June 19, 2012), and St. Barnabas Hospital (BSA Cal. No. 246-08-BZ) (May 19, 2009); and

WHEREAS, with regards to SEIU 32BJ's argument that the courts have rejected efforts to expand the *Cornell* Doctrine to buildings owned by religious and educational institutions put to "auxiliary purposes," the Board notes that in the cases cited by SEIU 32BJ on that point, the extension of deference was denied because there was no nexus between the reason for the deference (i.e. education and/or the free exercise of religion) and the actual use of the development seeking the deference; and

WHEREAS, in *People v. Kalayjian*, 76 Misc 2d 1097 (Sup Ct App Term 2d Dept 1973), the court found

2017-190-BZ
CEQR #17-BSA-132Q

that a four-family dwelling occupied by members of the American Orthodox Catholic Church, but in which no religious services were conducted, did not constitute a religious use under the applicable zoning ordinance; and

WHEREAS, similarly, in *Bright House Horizon v. Zoning Board*, 121 Misc 2d 703 (Sup Ct Monroe County 1983), the court ruled that the Zoning Board of Appeals of the Town of Henrietta (the “Henrietta ZBA”) justifiably found that a health care and residential facility proposed by a non-profit corporation on behalf of the Church of First Christ Science, which was proposed to use Christian Science beliefs in lieu of traditional medical care, was not a permitted use in the subject district—which permitted churches as-of-right, but did not define the term “church”—where the proposed use did not qualify as a “church” because its purpose was not public worship, an activity typically associated with a church according to Webster’s New International Dictionary, Third Edition, but, instead, was a nursing facility intended to provide skilled nursing care for those seeking healing through Christian Science; further, the facility was not accessory to a church because it was across the street from the local Christian Science Church, not on the same lot as required for an “accessory use” under the Town Code; and

WHEREAS, in its affirmance of the Henrietta ZBA’s denial of deference to the development, the court states, “[t]he constitutional protection afforded all religions and religious beliefs is not hindered by the law’s refusal to mandate zoning approval of every institution solely because it is sponsored or operated by a religious organization in accordance with its beliefs. . . . It is the proposed use of the land, not the religious nature of the organization, which must control,” 121 Misc.2d at 709; and

WHEREAS, in contrast, the *Cornell* Doctrine is herein proposed to be extended to facilitate the construction of 100 percent low-income affordable housing developments in order to address the currently high demand for such housing and the subject application is for a 100 percent low-income affordable housing development therefore, there is the nexus between the rationale for the deference and the proposed use of the subject property that was missing in both *Kalayjian* and *Bright House Horizon* and, accordingly, the Board finds those cases distinguishable and that they do not undermine the Applicant’s argument for deference; and

WHEREAS, finally, with regards to SEIU 32BJ’s argument that an extension of deference in this case will cause a “slippery slope,” the Board disagrees, clarifies that the application of the *Cornell* Doctrine to private educational institutions is not the result of a “slippery slope,” but, rather, based on the explicit

language of the case law articulating the doctrine, including *Cornell*, which cites earlier New York Court of Appeals and Appellate Division decisions for the proposition that “schools, public, parochial *and private*, by their very nature, singularly serve the public’s welfare and morals,” 68 NY2d at 593 (emphasis added), and *East Hampton Library*, where the court states that “[e]ven private institutions are entitled to deferential treatment as long as they carry out the educational mission of the State, as they have the same beneficial effect upon the general welfare of the community as public schools,” 31 Misc.3d 1231(A), 2011 NY Slip Op 50921(U) at *3; and

WHEREAS, as clarified by the court in *East Hampton Library*, it is the entity’s furtherance of the State’s defined public purpose that entitles that entity to deferential treatment—hence, if deference were applied, as here suggested, where an affordable housing emergency has been declared, the solutions for which are set forth in a myriad of state-sponsored initiatives aimed at creating and preserving housing units for low-income earners, that deference should be extended only to those development projects that would fulfill this stated public purpose and dedicate 100 percent of their dwelling units to low-income earners for the life of the developments; the deference would decidedly not apply to developments that would dilute the stated public purpose by housing fewer low-income households in the project, or housing such households for a limited term of years, or as part of a project primarily aimed at providing additional market rate units; and

WHEREAS, the Board finds no support in the record for SEIU 32BJ’s argument that this extension of the *Cornell* Doctrine will result in deference being granted to market-rate housing developments, mixed-income housing developments, or to 100 percent low-income projects that are not maintained as such for the life of the building, since the stated affordable housing emergency does not encompass market-rate units; and

WHEREAS, the Board notes that the purpose of the extension of the *Cornell* Doctrine in the context of facilitating the development of housing units affordable for extremely low-, very low- and low-income earners is that in the absence of the requested bulk waivers, the Applicant is unable to provide enough units to make the development financially viable and will ultimately create zero affordable housing units; mixed-income housing developments, in contrast, utilize market rate and moderate-income housing units to subsidize the low-income units, often obviating any need for government assistance in the form of financial subsidies or zoning relief; and

WHEREAS, thus, the Board finds that its cabining of the extension of the *Cornell* Doctrine to facilitate only the development of 100 percent low-income affordable housing for the life of the

2017-190-BZ
CEQR #17-BSA-132Q

development will not create a slippery slope because the extension is so narrowly defined both in terms of the use for which it may be applied and the emergency the deference is meant to address—the crisis-level insufficiency of housing units in New York City that are actually affordable for low-income earners; and

WHEREAS, according to the Association for Neighborhood and Housing Development (“ANHD”), an umbrella organization of 100 not-for-profit affordable housing development groups serving New York City, in 2015, extremely low- to low-income earners (those earning 10-100 percent area median income (“AMI”)) made up 67 percent of New York City’s population with extremely low-income earners (those earning 10-30 percent AMI) constituting 27 percent of New York City’s population overall, very low- to low-income earners (those earning 40-80 percent AMI) making up 30 percent of New York City’s population overall and low moderate-income earners (those earning 90-100 percent AMI) making up only approximately 9 percent of New York City’s population overall; and

WHEREAS, thus, extremely low- to low-income residents, 57 percent of New York City’s residents, suffer the most from the housing crisis and developments proposed to provide low-income affordable housing are most often subjected to strong opposition by existing residents, in much the same way that protectionist residents oppose houses of worship and educational facilities²; and

WHEREAS, the Board recognizes the natural link between the public policy initiatives that have been put in place over decades by various levels of government aimed at supporting and defending religious and educational institutions and the development of buildings designed to facilitate those institutions’ goals and that similar public policy initiatives have been

1 As of the date of this decision, the income bands (expressed as a percentage of AMI) that qualify as extremely

low-, very low- and low-income earners as expressed here, courtesy of ANHD, are consistent with those that qualify for such designation by the U.S. Department of Housing and Urban Development (“HUD”) and the New York City Department of Housing Preservation and Development (“HPD”).

2 This phenomenon is noted by the court in *Cornell* in its discussion of how the advent of the automobile and the growth and diversification of religious and educational institutions brought a host of new problems to residential areas and caused neighbors to view the construction of a new school “with distrust and concern that it would unnecessarily bring people from other communities into the neighborhood” 68 NY2d at 593.

aimed at housing the homeless and the underprivileged and encouraging the provision of affordable housing; and

WHEREAS, the Board acknowledges that the provision of affordable housing, especially low-income housing that is truly affordable, has been a major priority for New York City, State and federal administrations; and

WHEREAS, however, the Board finds unequivocally, that to prevent abuse—i.e. reliance on the *Cornell* Doctrine to facilitate projects that include any amount of market rate housing and/or less than 100 percent affordable housing for low-income persons for the life of the building—the extension of the doctrine must be restricted to (1) not-for-profit entities, (2) with an extensive history of developing and managing 100 percent low-income affordable housing, (3) for developments with restricted rents that are, in their entirety, targeted to extremely low-, very low- and low-income earners, (4) that will remain rent-restricted to such earners for the life of the development; and

WHEREAS, specifically, the Board states that the expansion of the *Cornell* Doctrine considered herein would not be available for projects that will not remain 100 percent affordable for the life of the development (i.e. are only required to remain affordable subject to a termed regulatory agreement) or to for-profit developers where only a portion of the development will qualify as low-income affordable housing; and

WHEREAS, in addition, the Board finds that the expansion of the *Cornell* Doctrine, for cases like the subject application is one way to respond to the clear housing emergency presently facing New York City; and

WHEREAS, in this case the Applicant has a very long history of developing and managing 100 percent affordable housing for low-income New Yorkers and its primary focus as an institution is in providing and maintaining this kind of low-income housing; it is also important that under Catholic Charities’ mandate, the housing will remain affordable for the life of the development, otherwise bulk variances would not be appropriate because they last for the life of the building; and

WHEREAS, therefore, for all of the reasons set forth herein, the Board finds that it is appropriate to extend the *Cornell* Doctrine to the subject application as proposed herein; and

WHEREAS, because the Board finds that the Applicant, as a not-for-profit developer of 100 percent low-income affordable housing to be kept affordable to low-income earners for the life of the development, is entitled to deference similarly afforded to educational and religious institutions under the law of the State of New York as to zoning, the Applicant is able to rely on its programmatic needs in support of the subject

2017-190-BZ
CEQR #17-BSA-132Q

variance application; and

WHEREAS, as with religious and educational institutions, not-for-profit entities that wish to avail themselves of this extension of the *Cornell* Doctrine to not-for-profit 100 percent low-income housing developments will be required to demonstrate that the waivers requested are directly related to the public policy goal justifying the expansion and the entity's programmatic needs—to wit, the provision of 100 percent low-income housing units—and that the waivers requested are the minimum necessary to ensure a viable project that meets State and City requirements for subsidies; and

WHEREAS, the subject application originally proposed a development with 19 parking spaces and a seven-story building having a total height of 71 feet, with 92 AIRS units and an additional 7,972 square feet of floor area for a Use Group 4 senior center open to the general public on the ground floor, and requested additional waivers of the rear yard and permitted obstruction requirements applicable to the site, set forth in ZR §§ 23-47 and 24-33, to permit a portion of the public senior center to obstruct the required rear yard, and a waiver of ZR § 24-11 to allow the exceedance of the maximum floor area ratio permitted for a community facility use in a residential district; and

WHEREAS, while the Board acknowledges that parking spaces and a community center may be desirable at the site, such uses are neither required under zoning nor mandated by the Applicant's program with regards to providing affordable housing for low-income earners—the parking spaces were proposed for staff of the proposed community center and residents of the proposed building who may retain access to a vehicle and appreciate the convenience of parking on-site and the community center was proposed in order to fill a neighborhood need for gathering spaces for seniors; and

WHEREAS, further, the Applicant has not demonstrated a practical difficulty or unnecessary hardship resulting from a unique physical condition at the site that could support the grant of additional waivers to support a programmatic preference that falls outside of the provision of affordable housing for low-income seniors; and

WHEREAS, accordingly, the Applicant revised the proposal to eliminate the on-site parking spaces and Use Group 4 community center, eliminating the request for a waiver of ZR § 24-33, and providing a required 30 foot rear yard, eliminating the waiver for ZR § 23-47; and

WHEREAS, the subject proposal instead provides 6,328 square feet of accessory space on the ground floor for the provision of accessory social and welfare facilities and recreation space primarily for the senior residents of the subject building; and

WHEREAS, pursuant to the definition of “Affordable independent residence for seniors” in ZR § 12-10, the proposed building must provide floor space in an amount of not less than four percent of the total floor area for “related *accessory* social and welfare facilities primarily for residents” (emphasis in original to indicate a term defined elsewhere in ZR § 12-10) of the subject building; and

WHEREAS, in addition, pursuant to ZR § 28-21, the building must provide recreation space equal to at least 3.3 percent of the total residential floor area; and

WHEREAS, the accessory recreation, social and welfare facilities space proposed herein constitutes approximately 8.5 percent of the total residential floor area in the building, slightly more than the 7.3 percent accessory recreation, social and welfare facilities space required pursuant to ZR §§ 12-10 and 28-21 combined, consisting of a large multi-purpose indoor recreation space, a kitchen, computer room, social service office, fitness room, art room and library; and

WHEREAS, the Applicant states that these facilities are necessary because, over its 40 year history, the Applicant has observed that low-income and formerly homeless seniors require more space and resources for the provision of social support and services; and

WHEREAS, the space is comparable to spaces provided in other of the Applicant's facilities in Brooklyn, which host fitness classes, computer classes, art classes, health screenings, bingo nights, lectures on topics such as insurance, chronic disease management and tenant rights, and will host similar programming with the goal of providing a safe and convenient environment in which the tenants can maintain their independence, interact with neighbors and build a supportive community; and

WHEREAS, among the social services provided to residents of Catholic Charities' developments generally are development and youth services, literacy and job training, food and nutrition programs, health care and mental health services, senior services, disability services, homeless services and substance abuse programs; and

WHEREAS, Catholic Charities submits that, by providing opportunities for socialization, educational programs and nutritional meals on-site, its senior residents are able to maintain their independence as well as their health and realize a higher quality of life; and

WHEREAS, the Applicant states that the subject proposed building has been designed based on their experience in developing low-income senior housing, particularly with regards to the size, layout and programming of the accessory space on the ground floor, which the Applicant anticipates to have to accommodate not only the building tenants and their

2017-190-BZ
CEQR #17-BSA-132Q

visitors, but also the caregivers that work with approximately 50 percent of those tenants, an estimate based on the Applicant's observations at four other facilities they operate in Brooklyn and Queens, and also provide the additional resources required for the 30 percent of its tenants who will be formerly homeless seniors; and

WHEREAS, the Applicant asserts that an as-of-right development at the site, consisting of 64 units instead of the 92 proposed in this application, is untenable because buildings with such low low-income affordable unit counts are unlikely to be funded and, without such funding, built; additionally, by constructing more units, the Applicant is able to obtain government funding from additional sources and, thus, develop a 100 percent affordable supportive housing project for low-income seniors at the site; and

WHEREAS, the Applicant's consultant asserted at hearing that the per unit cost of the as-of-right development at the site is exceptionally high and fails to meet the income-to-expense ratio that makes obtaining financing for the development—and thus, its eventual construction and operation—possible; and

WHEREAS, in support of this contention, by letter dated March 19, 2018, the New York City Department of Housing Preservation and Development's ("HPD") Division of Special Needs Housing states that "the assumptions made in the Financing Memorandum" prepared by the Applicant's consultant, "support the [A]pplicant's assertion that the proposed 93-unit building is the most viable option among the options studied" for the subject site; and

WHEREAS, based on the above, the Board finds that because the subject proposal is a 100 percent low-income housing development that will remain affordable to low-income households for the life of the building, that the project is proposed to be developed by an experienced not-for-profit developer and because the waivers requested are directly related to the public policy goal of the provision of 100 percent low-income housing units, the subject proposal is entitled to deference under the herein expanded *Cornell* Doctrine, hence no finding of unique physical conditions, unnecessary hardship or practical difficulty pursuant to ZR § 72-21(a) need be found; and

WHEREAS, because the Applicant is a not-for-profit organization and the variance is needed to further its mission, the finding set forth in ZR § 72-21(b) need not be made in order to grant the variance request in this application; and

WHEREAS, the Applicant states that, pursuant to ZR § 72-21(c), the variance, if granted, will not alter the character of the neighborhood, impair the appropriate use or development of adjacent property or be detrimental to the public welfare; and

WHEREAS, specifically, the Applicant asserts

that the proposed AIRS building is consistent with the surrounding area, which is residential in character, with a mix of multi-family elevator and walk-up buildings along with one- and two-family dwellings; additionally, another Catherine Sheridan AIRS facility, an 11-story, 97 foot tall building, is located immediately across 31st Road from the subject site at 31-41 23rd Street; in terms of the bulk of surrounding buildings, the Applicant states that the majority of buildings in the immediate area have four to six-stories and the proposed, at six-stories and 61'-8" total height, is comparable in height to existing buildings located immediately to the north and east of the subject site and, thus, will not impede those developments' access to light and air; and

WHEREAS, in support of these contentions, the Applicant submitted a height study, photographic streetscape montage, contextual streetscape illustrations and an aerial photographic neighborhood study demonstrating that the proposed AIRS building befits the built conditions of the immediate area; and

WHEREAS, the Applicant submitted a Construction Code Determination Form to DOB requesting a confirmation of the proposed development's compliance with applicable sections of the 2014 New York City Building Code's ("BC") Appendix G, titled Flood-Resistant Construction; and

WHEREAS, by decision dated April 3, 2018, DOB determined that the proposal complies with the applicable requirements of Appendix G on condition that: prior to permit approval, the plan examiner shall verify that the final construction documents demonstrate compliance with Appendix G; the Applicant confirms that the slab on grade construction complies with BC G301.2 and shall be designed and constructed to resist the loads and load combinations specified in Appendix G and ASCE 24; the Applicant updates the reference regarding compliance with plumbing and sanitary systems to ASCE 24 Chapter 8, not Chapter 7; the Applicant confirms that the use of any fill will be placed, compacted and sloped to minimize shifting, slumping and erosion during the rise and fall of flood water in accordance with ASCE 24; and that the Applicant shall indicate that an elevation certificate is required prior to sign-off as part of the flood zone compliance special inspection; and

WHEREAS, the Applicant additionally submitted a Zoning Resolution Determination Form to DOB requesting confirmation of the proposed development's compliance with applicable sections of Article VI, Chapter 4 of the Zoning Resolution, titled Special Regulations Applying in Flood Hazard Areas; and

WHEREAS, by decision dated April 3, 2018, DOB determined that the proposal complies with the applicable requirements of ZR § 64-00, et seq., on condition that prior to permit approval, the plan

2017-190-BZ
CEQR #17-BSA-132Q

examiner verifies that the final construction documents demonstrate compliance with Appendix G of the 2014 NYC Building Code; and

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

WHEREAS, the practical difficulties complained of are inherent to the developmental challenges of providing 100 percent low-income affordable housing units at the site, accordingly, the Board finds that the hardship herein was not created by the owner of the site or a predecessor in title in satisfaction of ZR § 72-21(d); and

WHEREAS, the Applicant represents that, consistent with ZR § 72-21(e), the subject proposal represents the minimum variance needed to accommodate its programmatic needs; and

WHEREAS, the Applicant relies on its experience as a developer of affordable housing in Brooklyn and Queens to assert that the provision of 92 AIRS units plus one superintendent's units, as proposed herein, is the minimum required to secure the necessary financing and meets its programmatic goal to efficiently provide social services and 100 percent affordable housing for low-income seniors in accordance with HPD design guidelines; and

WHEREAS, the Board notes that the Applicant originally proposed a seven-story building having a total height of 71 feet, an additional 7,972 square feet of floor area for a community facility use open to the general public on the first floor and requested additional waivers of ZR §§ 23-47, 24-33 and 24-11; and

WHEREAS, HPD reviewed the proposed development plans and financing memorandum prepared on behalf of the Applicant and, by letter dated March 19, 2018, confirmed that the plans generally comply with HPD standards for developments of this type; and

WHEREAS, the Board finds that this proposal is the minimum necessary to allow the Applicant to fulfill its programmatic needs; and

WHEREAS, therefore, 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 an Unlisted action pursuant to 6 NYCRR, Part 617.2; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Environmental Assessment Statement Short Form CEQR No. 17BSA132Q, dated February 28, 2018; and

WHEREAS, the EAS documents that the project as proposed would not have significant 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; or Construction; and

WHEREAS, the New York City Landmarks Preservation Commission reviewed the subject proposal and concluded that the subject site is of neither architectural nor archaeological significance; and

WHEREAS, by letter dated July 12, 2017, the New York City Department of Environmental Protection ("DEP") states that based on the results of the air quality analysis, it was determined that the development proposed herein would not result in any potential for significant adverse impacts with regards to air quality; and

WHEREAS, by letter dated January 2, 2018, DEP states that it has determined that the proposed project will not result in any potential for significant adverse impacts with regards to noise; and

WHEREAS, the New York City Department of City Planning reviewed the project for consistency with the policies and intent of the New York City Waterfront Revitalization Program ("WRP") under WRP #17-124 and concluded that the action is consistent with and will not substantially hinder the achievement of any WRP policies; and

WHEREAS, the New York City Department of Parks reviewed the proposal with regards to open space and in response to Parks comments citing the lack of open space in the neighborhood, the Applicant included a description of the on-site recreation amenities proposed and how these meet the needs of the residents; and

WHEREAS, an "E" designation (E-468) has been placed on the site for hazardous materials; and

WHEREAS, no other significant 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 Negative Declaration 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 1997, as amended, and makes each and every one of the required findings under ZR § 72-21 to permit, on a site located in an R6B zoning district, the construction of a six-story Use Group 2 affordable

2017-190-BZ
CEQR #17-BSA-132Q

independent residence for seniors that does not comply with the zoning regulations relating to floor area ratio and maximum height and set back, contrary to ZR §§ 23-155 and 23-662; *on condition* that all work shall substantially conform to drawings filed with this application marked "Received March 19, 2018"—Nine (9) sheets; and *on further condition*:

THAT the following shall be the bulk parameters of the building: a maximum of 74,274 square feet of floor area, a maximum floor area ratio of 2.90, a maximum base height and maximum building height of 61'-8" and a setback of at least 0 feet from 31st Road and a setback of at least 0 feet from 23rd Street, as indicated on the BSA-approved plans;

THAT the subject building be developed as 100 percent housing for seniors affordable for those in the 60 percent AMI and lower income range;

THAT this variance grant is exclusively for the benefit of the subject Applicant, Catherine Sheridan Housing Development Fund Company, Inc., a subsidiary of Catholic Charities Progress of Peoples Development Corporation, the non-profit developer of affordable housing for its parent entity, Catholic Charities Brooklyn and Queens;

THAT this grant may not be transferred to another developer without the express consent of the Board, which developer must also be an experienced not-for-profit low-income housing developer;

THAT the building, once constructed, shall remain affordable at the 60 percent AMI and lower income range for the life of the building;

THAT the façades, landscaping and site furnishings, as shown on the BSA-approved plans, shall be maintained in good condition and repaired and replaced as necessary to meet that criteria;

THAT prior to DOB permit approval, the plan examiner shall verify that the final construction documents demonstrate compliance with Appendix G of the 2014 NYC Building Code;

THAT the Applicant shall confirm that the slab on grade construction complies with BC G301.2 and shall be designed and constructed to resist the loads and load combinations specified in Appendix G and ASCE 24;

THAT the Applicant shall update the reference regarding compliance with plumbing and sanitary systems to ASCE 24 Chapter 8, not Chapter 7;

THAT the Applicant shall confirm that the use of any fill will be placed, compacted and sloped to minimize shifting, slumping and erosion during the rise and fall of flood water in accordance with ASCE 24;

A true copy of resolution adopted by the Board of Standards and Appeals, April 10, 2018.
Printed in Bulletin Nos. 15-16, Vol. 103.

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

THAT the Applicant shall indicate that an elevation certificate is required prior to sign off as part of the flood zone compliance special inspection;

THAT an E designation (E-468) is placed on the site to ensure proper hazardous materials remediation;

THAT the project shall use natural gas as the fuel type for the HVAC system;

THAT the above conditions shall be listed on the Certificate of Occupancy;

THAT substantial construction shall be completed pursuant to ZR § 72-23;

THAT a Certificate of Occupancy shall be obtained within four (4) years, by April 10, 2022;

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

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

THAT DOB must 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)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, April 10, 2018.

