

2017-8-BZ

CEQR #17-BSA-062X

APPLICANT – Sheldon Lobel, P.C., for Academic Leadership Charter School, owner.

SUBJECT – Application January 9, 2017 – Variance (§72-21) to permit the construction of a new school (UG 3) (*Academic Leadership Charter School*) contrary to ZR §24-11 (Maximum Allowable Lot Coverage), ZR §24-522 (Heights and Setbacks) and ZR §2436 (Rear Yard). R6 zoning district.

PREMISES AFFECTED – 356-362 East 139th Street, Block 2301, Lot(s) 12, 13, 14, 15, Borough of Bronx.

COMMUNITY BOARD #1BX

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta and Commissioner Scibetta.....5

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Department of Buildings (“DOB”), dated November 16, 2017, acting on DOB Application No. 210177672 reads in pertinent part:

1. ZR 24-36: The proposed building is contrary to rear yard requirements in a R-6 zoning [district] pursuant to ZR 24-36 . . . ;
2. ZR 24-11: The proposed building is contrary to lot coverage requirement in a R-6 zoning [district] pursuant to ZR 24-11 . . . ;
3. ZR 24-522: The proposed building is contrary to front wall and sky exposure plane requirements in a R-6 zoning [district] pursuant to ZR 24-522 . . . ; and

WHEREAS, this is an application under ZR § 72-21 to permit, on a site located within an R6 zoning district in the Bronx, the construction of seven-story plus cellar Use Group (“UG”) 3 school that does not comply with the zoning regulations relating to lot coverage, rear yards, front wall height and sky exposure plane, contrary to ZR § 24-11, 24-36 and 24-522; and

WHEREAS, this application is filed on behalf of Academic Leadership Charter School, a non-profit entity (the “Applicant”) and New York City Department of Education authorized Charter School; and

WHEREAS, a public hearing was held on this application on March 27, 2018, after due notice by publication in *The City Record*, with continued hearings on October 11, 2018, January 8, 2019, and February 26, 2019, and then to decision on February 26, 2019; and

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

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

WHEREAS, the subject site is comprised of four adjacent tax lots located on the south side of East 139th Street, between Alexander Avenue and Willis Avenue, in an R6 zoning district, in the Bronx; and

WHEREAS, the site has approximately 125 feet of frontage along East 139th Street, a depth of 100 feet, 12,500 square feet of lot area and is currently vacant; and

WHEREAS, the Applicant proposes to occupy the site with a seven-story plus cellar building with 59,901 square feet of floor area, a floor area ratio (“FAR”) of 4.79, 100 percent lot coverage, no rear yard set back, a front wall rising to a height of 88 feet without setback and within the sky exposure plane; and

WHEREAS, for the subject intended occupancy at the subject site, a maximum of 65 percent lot coverage is permitted pursuant to ZR § 24-11; a rear yard with a depth of at least 30 feet is required pursuant to ZR § 24-36; and a maximum front wall height of 60 feet or six stories, whichever is less, above which a 20 foot front set back and compliance with a 2.7 to 1 (vertical distance to horizontal distance) slope are required, is permitted pursuant to ZR § 24-522; and

WHEREAS, accordingly, the Applicant seeks the subject relief to facilitate the development of a UG 3 school that will relocate their 250 middle school students (grades five through eight) students, currently co-located with another school located at 470 Jackson Avenue, and include elementary classroom space in addition to that located at the Applicant’s existing elementary school, which is co-located within a public school building located at 677 East 141st Street in the Bronx; and

WHEREAS, the Applicant asserts that the existing middle school is inadequate for the programmatic needs of the school because the co-location provides the students with limited access to the cafeteria and gymnasium, does not include an outside play area, has a insufficiently sized library and lacks a science lab; and

WHEREAS, the Applicant proposes to relocate the existing middle school to the premises; open for the 2019-2020 school year with a total enrollment of 500 students (the 250 existing middle school students, 75 additional middle school students and 175 new elementary school students); and reach a target enrollment of 600 students (275 elementary school students and 325 middle school students) within three years (the 2022-2023 school year); and

WHEREAS, the proposed building includes 28 accessory off-street parking spaces and a refrigerated trash room in the cellar; a lobby, regulation-sized gymnasium with the capacity to double-function as an auditorium, administrative offices, storage and bathrooms on the first floor; a nurse’s office, boys’ and girls’ locker rooms and faculty spaces on the second floor; a cafeteria and 1,600 square foot library on the third floor with a roof terrace at the rear of the building on the roof of the second floor; two kindergarten classrooms, four general use classrooms, an art classroom and an administrative office on the fourth floor; six general use classrooms, a special education classroom and a music classroom on the fifth floor; six

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general use classrooms, a special education classroom and a science classroom on each of the sixth and seventh floors; and an outdoor play area on the roof (the "Proposed School"; and

WHEREAS, the Applicant asserts that a building in full compliance with the Zoning Resolution would provide fewer and smaller classrooms, one fewer science classroom, a smaller gymnasium and no locker rooms, a cafeteria with the capacity to be converted to a 365-seat auditorium (compared to the gymnasium in the Proposed School, which as a capacity of 648 persons when configured as an auditorium), a library containing less than half the floor area of the library in the Proposed School; and less administrative space; and

WHEREAS, in addition, at the Board's request, the applicant explored alternative lesser variances—(1) a building with no accessory off-street parking spaces in the cellar, a street wall rising to a height of 76 feet without setback that penetrates the sky exposure plane; 100 percent lot coverage to a height of 16 feet and 70 percent above 23 feet and a compliant rear yard; and (2) an eight-story building with accessory off-street parking spaces in the cellar that complies with street wall height, setback and sky exposure plane provisions, but would require a waiver of lot coverage and rear yard provisions to permit 100 percent lot coverage to a height of 26 feet and 70 percent lot coverage above 26 feet—but that the minimal reduction in the requested waivers are outweighed by the reduced program space provided in each of the alternative scenarios; and

WHEREAS, the Applicant represents that in addition to better accommodating its existing middle school, the Proposed School will enable the Applicant to gradually expand both its elementary and middle school divisions in response to the incredible demand for additional school seats in the area; and

WHEREAS, with regards to the need to provide accessory off-street parking spaces at the site, the Applicant asserts that such parking spaces are necessary because of the lack of sufficient on-street parking in the area and the school's employment of teachers that tend to drive to the premises and are required to arrive by 7 a.m.; and

WHEREAS, in support of this contention, the Applicant submitted letters from several of its teachers confirming the need for parking on the premises and difficulty in finding on-street parking in the area; a letter from Community Board 1, the Bronx, stating that, without the accessory off-street parking spaces proposed, the Applicant will be unable to attract and keep talented teachers; and a letter from the 40th Precinct of the New York Police Department in support of the off-street parking spaces included in the Proposed School; and

WHEREAS, the Board acknowledges that the Applicant, as an educational institution, is entitled to deference under the law of the State of New York as to zoning and its ability to rely upon programmatic needs in support of the subject variance application; and

WHEREAS, specifically, as held in *Cornell*

University v. Bagnardi, 68 NY2d 583 (1986), an educational or religious institution's application is to be granted unless it can be shown to have an adverse effect on the health, safety or welfare of the community and general concerns about traffic and disruption of the residential character of the neighborhood are insufficient grounds for the denial of such application; and

WHEREAS, based on the above, the Board finds that the Applicant's programmatic needs create unnecessary hardship and practical difficulty in developing the premises in compliance with the applicable zoning regulations; and

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

WHEREAS, the applicant represents 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, to wit, the surrounding area is characterized by multi-family residential, community facility and mixed-use buildings ranging from three-stories to seven-stories, that there are eight-story buildings and apartment towers within two blocks of the premises; that the Proposed School complies with applicable regulations pertaining to floor area and FAR; and that a Use Group 3 school is permitted as-of-right in the subject zoning district; and

WHEREAS, in response to the Board's request, the Applicant modified the proposed exterior building finishing materials from EIFS (exterior insulation and finishing system) to masonry; and

WHEREAS, accordingly, the Board finds that the Proposed School will not alter the character of the neighborhood in satisfaction of ZR § 72-21(c); and

WHEREAS, the Applicant states that the practical difficulties complained of are inherent to its unique programming needs and were not caused by the owner of the site or a predecessor in title; and

WHEREAS, the Board finds that the hardship herein was not created by the Applicant; and

WHEREAS, the Applicant submits that, consistent with ZR § 72-21(e), the subject proposal represents the minimum variance needed to accommodate its programmatic needs; 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, by letter dated January 25, 2019, the Fire Department states that it grants the Applicant's application for a modification (variance) from the rooftop access and obstruction provisions of Section 504.4 of the New York City Fire Code and determined

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that the rooftop plan (Sheets P-02, P-06, and P-11 of the plans approved by the Board with this application) provides adequate Fire Department access to and upon the rooftop subject to the following conditions: (1) the determination only modifies compliance with respect to rooftop access and/or clear path requirements and does not modify the Applicant's obligation to comply with other applicable provisions of FC 504.4, including the marking and signage requirements of FC 504.4.7 and 504.4.8; (2) nothing contained in the determination be construed to authorize construction contrary to the New York City Building Code, Zoning Resolution or other applicable laws, rules or regulations; (3) approved modified rooftop access and/or clear path requirements as indicated on architectural drawing P-02, P-06, P-11, dated January 02, 2019, shall be constructed and maintained in accordance with the approved rooftop plan and maintained clear of obstruction and kept available for emergency responders; if any change is necessary, a new application shall be submitted to modify them; (4) the modification is site specific applicable only to the subject address and not transferable to any other address; and (5) the following stipulations listed below must be completed as detailed on P-02, P-06, P-11, dated January 02, 2019: (a) installation of the inward swinging gates to allow clear path through the proposed fences on both the upper and lower rooftops and (b) installation of signage indicating the location of the gates on both the upper and lower rooftops; and

WHEREAS, by letter dated January 28, 2019, the Fire Department states that the plans and application have been approved by the Office of Technical Management in the Bureau of Fire Prevention and has no objection to this application; and

WHEREAS, the project is classified as a Type I action pursuant to 6 NYCRR, Part 617.4(b)(9); and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement ("EAS") CEQR No. 17BSA062X, received February 16, 2018; 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 or Construction; and

WHEREAS, by letter dated November 15, 2017, the New York City Department of Environmental Protection ("DEP") states that they have reviewed the December 2016 Environmental Assessment Statement, January 2016 Phase I Environmental Site Assessment (Phase I) and the February 2016 Phase II

Environmental Site Assessment-Vapor Intrusion Evaluation (Phase II) provided by the Applicant's consultants and recommended that the Board inform the Applicant that based on the historical on-site and/or surrounding area land uses, as well as the results of the February 2016 Phase II-Vapor Intrusion Evaluation, a Supplemental Phase II Environmental Site Assessment is necessary to adequately identify/characterize the surface and subsurface soils of the subject parcels; a Phase II Investigative Protocol/Work Plan—including blueprints and/or site plans displaying the current surface grade and sub-grade elevations and a site map depicting the proposed soil boring locations—summarizing the proposed drilling, soil and groundwater sampling activities be submitted to DEP for review and approval; that soil and groundwater sample be collected and analyzed by a New York State Department of Health Environmental Laboratory Approval Program certified laboratory for the presence of VOCs by EPA Method 8260, semi-volatile organic compounds by EPA Method 8270, pesticides by EPA Method 80081, polychlorinated biphenyls by EPA Method 8082, Target Analyte List metals (filtered and unfiltered for groundwater samples); an Investigative Health and Safety Plan (HASP) be submitted to DEP for review and approval; and that the Phase II Work Plan and HASP be submitted to DEP for review and approval prior to the start of any fieldwork; and

WHEREAS, by letter dated February 16, 2018, DEP states that they have reviewed the January 2018 Supplemental Phase II Environmental Site Assessment Work Plan (Phase II Work Plan) and the January 2018 Health and Safety Plan (HASP) prepared by the Applicant's consultants and recommended, in reference to the Phase II Work Plan, that the Board instruct the Applicant to individually label the proposed soil and groundwater sampling locations on the Proposed Sample Locations Plan (e.g. SB-1, GW-1, etc.) and revise the soil sampling depths—at a minimum, one surface soil sample and one subsurface soil sample should be collected from each soil boring, the surface soil sample should be collected from 0-2 feet bgs and the subsurface soil sample should be collected between 2 feet bgs and the maximum proposed excavation depth (based on visual/olfactory evidence of impacts and/or elevated soil screening readings obtained using accepted field instruments; if no evidence or elevated readings are noted during borehole advancement, the subsurface soil sample should be collected from the two foot interval between the proposed maximum excavation depth(s) and/or the groundwater interface (whichever is encountered first); and, with regards to the HASP, DEP recommended that the Applicant include information fact sheets and/or Safety Data Sheets for potential contaminants of concern; and

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WHEREAS, DEP found the January 2018 Phase II Work Plan and HASP for the proposed investigation acceptable so long as the requested information is incorporated into those documents and on condition that, upon completion of the investigation activities at the site, the applicant submit a detailed Phase II Report—including, at a minimum, an executive summary, narrative of the field activities, laboratory data and conclusions, comparison of soil and groundwater analytical results (i.e., New York State Department of Environmental Conservation (NYSDEC) 6 NYCRR Part 375 and NYSDEC Water Quality Regulations), updated site plans depicting sample locations, boring logs and remedial recommendations, if warranted—to DEP for review and approval; and

WHEREAS, the Applicant subsequently revised and resubmitted the Phase II Work Plan and HASP in accordance with DEP's February 16, 2018, letter on March 1, 2019; and

WHEREAS, by letter dated September 18, 2018, DEP states that they have reviewed the August 2018 Remedial Action Plan (RAP) and the August 2018 Construction Health and Safety Plan (CHASP) provided by the Applicant's consultants and, based on their review, recommended that proper handling, transportation and disposal of excavated materials from the site should be done in accordance with applicable NYSDEC regulations (not NYCDEP); if de-watering into New York City storm/sewer drains will occur during the proposed construction, a New York City Department of Environmental Protection Sewer Discharge Permit must be obtained prior to the start of any de-watering; the RAP be finalized and the certification page completed, the CHASP reflect the measures to be implemented during the construction phase of the proposed project and not those implemented during a proposed site investigation; all text referring to site investigation activities be revised accordingly; the date on the header of the CHASP be consistent with the date on the cover page; information fact sheets and/or Safety Data Sheets for potential contaminants of concern be included in the CHASP; the CHASP be finalized; and that a revised RAP And CHASP be submitted to DEP for review and approval prior to the start of any construction activities; and

WHEREAS, by letter dated October 19, 2018, DEP states that it has reviewed the Revised August 2018 RAP and Revised August 2018 CHASP and finds those documents acceptable on condition that, at the completion of the project, a Professional Engineer (P.E.) certified Remedial Closure Report indicating that all remedial requirements have been properly implemented (i.e., proper transportation/disposal manifests and certificates from impacted soils removed and properly disposed of in accordance with all NYSDEC Regulations; and proof of installation of engineering control systems, etc.) be submitted to DEP for review and approval for the proposed project; and

WHEREAS, in a letter dated January 31, 2019, DEP states that, based on the results of Air Quality

analysis performed as per the City Environmental Quality Review Technical Manual, it was determined that the proposed project would not result in any potential for significant adverse impacts in regards to air quality and, based on the results of the Noise analysis performed as per the City Environmental Quality Review Technical Manual, it was determined that the proposed project would not result in any potential for significant adverse impacts in regards to noise with the following commitments from the proposed project: (1) a composite window/wall noise attenuation of 33 dBA is proposed for the proposed project's southern façade facing the third floor outdoor play area (elevations of 28 feet and above); (2) the proposed third floor outdoor play area be installed with an acoustic fence providing a minimum noise attenuation of 10 dBA; and (3) an alternate means of ventilation be required and incorporated into the building design and construction; and

WHEREAS, by letter dated May 24, 2017, the School Safety Division of the New York City Department of Transportation ("DOT") states that it has no concerns regarding the proposed school and requests that the Applicant notify DOT upon construction in order for the division to determine if traffic safety improvements or parking regulations changes are necessary; and

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

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby issue a Type I Negative Declaration determination prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617 and § 6-07(b) of 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, to permit, in an R6 zoning district in the Bronx, the construction of seven-story plus cellar UG 3 school that does not comply with the zoning regulations relating to lot coverage, rear yards, front wall height and sky exposure plane, contrary to ZR § 24-11, 24-36 and 24-522; *on condition* that all work shall substantially conform to drawings as they apply to the objections noted above and filed with this application marked "Received February 26, 2019"—Twenty-three (23) sheets and "Approved for FDNY rooftop access Fire Code Section 504.4 only" – Three (3) sheets (sheets P-02, P-06, P-11); and *on further condition:*

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THAT the following shall be the bulk parameters of the building: a maximum of 100 percent lot coverage to a height of 28 feet; a rear yard with a minimum depth of 0 feet to a height of 28 feet; a rear yard with a minimum depth of 30 feet above 28 feet; and a maximum front wall height of 88 feet without setback that penetrates the sky exposure plane, as indicated on the BSA-approved plans; and

THAT the exterior finishing materials shall consist of masonry on side walls, masonry rain screen, metal panels and glazing on front and rear walls, as indicated on the BSA-approved plans, and the use of exterior insulation finishing system ("EIFS") shall not be permitted;

THAT composite window/wall noise attenuation of 33 dBA shall be provided on the southern façade of the building facing the third-floor outdoor play area (elevations of 28 feet and above);

THAT an acoustic fence, at least ten (10) feet in height be installed on the perimeter of the third-floor outdoor play area providing a minimum of 10 dBA noise attenuation;

THAT an alternate means of ventilation shall be incorporated into the building design and construction;

THAT approved modified rooftop access and/or clear path requirements as indicated on architectural drawing P-02, P-06, P-11, dated January 02, 2019, shall be constructed and maintained in accordance with the approved rooftop plan and maintained clear of obstruction and kept available for emergency responders;

THAT the following stipulations must be completed as detailed on P-02, P-06, P-11, dated January 02, 2019: (a) installation of the inward swinging gates to allow clear path through the proposed fences on both the upper and lower rooftops and (b) installation of signage indicating the location of the gates on both the upper and lower rooftops;

THAT no amplified lighting or sound shall be permitted on the roof of the building;

THAT upon completion of the investigation activities at the site, the applicant shall submit a detailed Phase II Report—including, at a minimum, an executive summary, narrative of the field activities, laboratory data and conclusions, comparison of soil and groundwater analytical results (i.e., New York State Department of Environmental Conservation (NYSDEC) 6 NYCRR Part 375 and NYSDEC Water Quality Regulations), updated site plans depicting sample locations, boring logs and remedial recommendations, if warranted—to the New York City Department of Environmental Planning ("DEP") for review and approval;

THAT at the completion of the project, a
**A true copy of resolution adopted by the Board of Standards and Appeals, February 26, 2019.
Printed in Bulletin Nos. 9-10, Vol. 104.**

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

Professional Engineer (P.E.) certified Remedial Closure Report indicating that all remedial requirements have been properly implemented (i.e., proper transportation/disposal manifests and certificates from impacted soils removed and properly disposed of in accordance with all NYSDEC Regulations; and proof of installation of engineering control systems, etc.) shall be submitted to DEP for review and approval for the proposed project;

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, indicating this approval and calendar number ("BSA Cal. No. 2017-8-BZ") shall be obtained within four (4) years, by February 26, 2023;

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, February 26, 2019.

