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BOARD OF STANDARDS AND APPEALS

MEETING OF: August 12, 2025
CALENDAR NO.: 2022-43-A
PREMISES: 638 East 11th Street, Manhattan
Block 393, Lots 25, 26, and 27

ACTION OF BOARD — Application dismissed for lack of prosecution.

THE VOTE —
Affirmative: Chair Chanda, Vice-Chair Scibetta,
Commissioner Ottley-Brown, Commissioner Sheta, and
Commissioner Yoon.....5
Negative:.....0

I. The Appeal

This is an application for an appeal seeking a variance, pursuant to Building Code (“Building Code” or “B.C.”), Appendix G, § G107, to permit dry floodproofing of a residential portion of a mixed-use building, in response to a determination of the Department of Buildings (“DOB”), under DOB Job No. 123783888, dated June 13, 2022, which stated, in pertinent part:

Dry floodproofing of residential portions of mixed-use buildings is not allowed (2014 BC Appendix G, Table 6-1, note ‘c’). Variance to Building Code cannot be granted at Plan Examiner level. Obtain BSA approval for variance as per BC G107.1 and BC G107.2.¹

The Board scheduled this appeal for initial public hearing, after due notice by publication in *The City Record*, on December 9, 2024, February 24, 2025, and May 5, 2025, and each time postponed the hearing due to the applicant’s lack of response. A public hearing was finally held on August 12, 2025, after due notice by publication in *The City Record*, and then to decision on that same date.

¹ After the applicant filed this instant variance application, the relevant section of the Building Code which sets forth the standards by which the Board may vary Appendix G was modified (and later renumbered from G107 to G105) as part of the 2022 revisions of the New York City Construction Codes. This resolution cites the 2014 Building Code (which was in effect, with some minor amendments, at the time that the applicant filed this subject application before the Board).

II. The Location

The Premises are located on the south side of East 11th Street, between Avenue B and Avenue C, in an R8B zoning district, in Manhattan. With approximately 75 feet of frontage along East 11th Street, 95 feet of depth, and 7,109 square feet of lot area, the Premises are occupied by a seven-story, mixed-use community facility and residential building (the “Building”).

III. The Proposal

The Premises have previously been the subject of appeals under BSA Cal. Nos. 107-13-A (denied on October 17, 2017) and 166-12-A (denied in part and granted in part on that same date), rearguments of those appeals (both denied on June 19, 2018), and, most recently, an interpretive appeal that the applicant filed in conjunction with this subject Building Code variance application, 2022-44-A (denied on May 6, 2024). After the Board’s denial of the separate appeal, under BSA Cal. No. 2022-44-A, involving the applicant’s intended conversion of portions of the Building’s cellar and first floor, which are below the design flood elevation (“DFE”), to residential use, the applicant now seeks a variance, pursuant to B.C. § G107, to permit dry floodproofing of these spaces at the Premises.

IV. Relevant Law

A. Appendix G of the Building Code

Appendix G of the New York City Building Code² regulates construction within the floodplains of the City and applies to not only new construction within a floodplain, but also “alterations or repairs to pre-FIRM buildings and structures...that increase the degree of noncompliance with this appendix,” including the “conversion of any space below the DFE from nonhabitable space into habitable space.” B.C. § G102.1(10.3). “Habitable space” is defined as including “[a]ll rooms and space within a dwelling unit, including bedrooms, living rooms, studies, recreation rooms, kitchens, dining rooms and other similar spaces,” such as the proposed dwelling spaces in the first floor and cellar of the Building. B.C. § 1202.1. Moreover, Appendix G mandates that “the lowest floor...shall be elevated to or above the design flood elevation.” B.C. § G304.1.1(1).

To determine the applicable DFE, Appendix G states, in pertinent part, that a building in Structural Occupancy Category II—i.e., most residential buildings, including the subject Building (*see* B.C., App’x G, § 1.4.3, Table 1-1)—must have a minimum elevation of flood

² The Building Code is part of the New York City Construction Codes, codified at Title 28 of the N.Y.C. Administrative Code and originally effective July 1, 2008. The Construction Codes replaced many provisions of the 1968 Building Code, which governed construction in the City prior to the enactment of the Construction Code, and was recently amended most substantially in 2014 and 2022 (in addition to less substantial revisions enacted before and after each of the substantial Construction Code amendments).

proofing relative to DFE as follows: “DFE = [Base Flood Elevation] BFE + 2 feet.” See B.C., App’x G, § 6.2, Table 6-1. Moreover, subsection (c) provides that “Dry floodproofing of residential buildings and residential portions of mixed-use buildings shall not be permitted.”³

Here, because the Federal Emergency Management Agency’s 2013 Preliminary Flood Insurance Rate Map (“PFIRM”) indicates that the Premises have a BFE of 11 feet, the applicable DFE would be 13 feet. Furthermore, as per subsection (c), it would require wet floodproofing to a level of 13 feet.

Regarding the conditions that an applicant must satisfy to support the Board’s grant of an Appendix G variance, B.C. § 107.2 and 107.3 state, in relevant part, the following:

G107.2.3 General conditions for variance.

Except for historic structures as provided for in Section G107.2.1, the Boar of Standards and Appeals is authorized to issue a variance only upon:

1. A determination that a new construction, substantial improvement, or other proposed development is located on a tax lot that, on November 16, 1983, was no more than ½ acre (0.2 hectare) in size. However, where the tax lot has been determined to be larger than ½ acre (0.2 hectare), the technical justification required for issuing the variance increases with the lot size;
2. Showing of good and sufficient cause;
3. Determination that failure to grant the variance would result in exceptional hardship to the applicant;
4. Determination that the granting of a variance will not result in:
 - a. Increased flood heights;
 - b. Additional threats to public safety;
 - c. Extraordinary public expense;
 - d. Nuisances;
 - e. Fraud on or victimization of the public; or
 - f. Conflict with existing local laws or ordinances; and

³ After the 2022 Construction Code revisions, subsections (c) and (d)(i) of B.C., App’x G, § 6.2, Table 6-1, were revised to state that “c. [w]et or dry floodproofing shall extend to the same level [as the DFE]” and “d. Dry floodproofing shall not be permitted (i) in buildings that are residential for flood zone purposes.” Because the subject spaces in the Building would be “residential for flood zone purposes” according to the 2022 B.C. §202 definition, the revised Table 6-1 would also prohibit the Building from having dry floodproofing, and as per subsection (c), would also require wet floodproofing to a level of 13 feet—as would the 2014 (pre-2022) Appendix G.

5. Determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.

G107.3 Standards for variance.

In reviewing applications for variances, the Board of Standards and Appeals shall consider all technical evaluations, all relevant factors, all other portions of this appendix and the following:

1. The danger that materials and debris may be swept onto other lands resulting in further injury or damage;
2. The danger to life and property due to flooding or erosion damage;
3. The susceptibility of the proposed development, including contents, to flood damage and the effect of such damage on current and future owners;
4. The importance of the services provided by the proposed development to the community;
5. The availability of alternate locations for the proposed development that are not subject to flooding or erosion;
6. The compatibility of the proposed development with existing and anticipated development;
7. The relationship of the proposed development to the comprehensive plan and floodplain management program for that area;
8. The safety of access to the property in times of flood for ordinary and emergency vehicles;
9. The expected heights, velocity, duration, rate of rise and debris and sediment transport of the floodwaters and the effects of wave action, if applicable, expected at the site; and
10. The costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical and water systems, streets and bridges.⁴

B. The Board's Appellate Jurisdiction under the Charter

Section 666(6)(a) of the New York City Charter states that the Board shall have the power:

⁴The 2022 B.C. amendments also modified § G107 and later renumbered it to G105; the revision retained 2014's G107.3 (now G105.6) text, but added "the compatibility of the proposed development with existing and anticipated development," and retained most of 2014's G107.2.3 (now G105.7) text, but revised the "cause" factor to "[a] technical showing of good and sufficient cause that the characteristics of the size, configuration or topography of the site renders the standards inappropriate."

[t]o hear and decide appeals from and review [. . .] except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or of a deputy commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of section six hundred forty-two or section six hundred forty-five of this charter.

C. Dismissal for Lack of Prosecution

New York courts have held that the Board has wide discretion to consider applications consistent with its expertise and jurisdiction. *See, e.g., Toys 'R' Us v. Silva*, 89 N.Y.2d 411, 418-419 (N.Y. 1996). However, the Board's determinations must be upheld only if the Board had a "rational basis" for such decision, as supported by "substantial evidence." *Id.*; *see also, e.g., Kettaneh v. Bd. of Standards and Appeals*, 925 N.Y.S.2d 494, 496 (1st Dep't, 2011). Accordingly, the Board may exercise its fact-finding authority to require the submission of substantial evidence, and, upon discerning that the applicant has not reasonably responded to the Board's requests for information and has not, after a reasonable time, submitted evidence into the record that would be sufficient to support a rational decision, then the Board may exercise its power to dismiss the application for lack of prosecution. *See* Board's Rules of Practice and Procedures ("Board's Rules") § 1-12.1.

In practice, after the applicant files its application before the Board, pays requisite fees, and provides proof of notice to applicable parties, the Board's Executive Director assigns the application to a project manager (or "examiner," as titled in the Board's Rules), who then reviews the application and drafts and distributes to the applicant a Notice of Comments that asks questions and seeks materials necessary for the Board to review the application at hearing. *Id.* After the project manager has determined that the application is "substantially complete," the Executive Director schedules the application for public hearing in accordance with the procedure described in the Board's Rules. *See* Board's Rules § 1-06.5.

V. Board Review

At hearing, the Board described the applicant's failure to communicate with Board staff and the lack of substantial evidence in the record. Specifically, the Board explained that the applicant filed this subject application on or about July 15, 2022, which included a Statement of Facts and Findings setting forth the applicant's contentions and representations in favor of both the separate appeal under BSA Cal. No. 2022-44-A and this subject application; documents from past proceedings before DOB and the Board from the prior appeals under BSA Cal. Nos. 107-13-A and 166-12-A and the events preceding the separate appeal under BSA Cal. No. 2022-44-A; documentation depicting the subject tax lots, zoning district, and prior

and existing iterations of the Building; an excerpt of the 2013 PFIRM showing this site within the subject flood hazard area; procedural documents; and an Economic Analysis purporting to explain the cost and feasibility of compliance with Appendix G.

On November 7, 2022, in response to the applicant's initial filing, Board staff sent the applicant a Notice of Comments seeking, among other information about the applicant's separate appeal under BSA Cal. No. 2022-44-A, various information and materials to support the applicant's application for a variance of Appendix G. The Notice of Comments, included, in pertinent part, the following:

2022-43-A (Appendix G Variance under G 107.1)

6. Provide proof of application referral as required by BSA Rule 1-06.4(a)(1).
7. Provide a CEQR filing for the application.
8. Copies of the relevant sections of the statute: Please also include the Section of Appendix G that is requested to be waived.
9. Table 6-1 was amended by Local Law 43 of 2021, please provide an updated copy.
10. Please provide a proposed set of plans for the Appendix G waiver request. The plans should show dry proofing and the flood log barrier, if this is still being proposed. If the Appendix G waiver request, is approved, this will be the set of plans approved by the Board.
11. Please provide the two sets of drawings discussed in the Statement for "Overview of Alternatives (p. 29-30 of 37) for compliance with DOB (AOR Plans).

Statement of Facts and Findings

12. Please indicate if a variance of G 304.1.1 is needed and Table BC G7-1, this is listed in the DOB denial.
13. It is unclear that the applications under Cal. No. 166-12-A and 107-13-A were presented as an amendment to the 2004 Alt 1 permit. The applications appear to be related to the review of the revocation of a CO and a review of the common law vested right before the applicable change of the ZR on September 9, 2004. Please revise the statement as necessary.
14. Cite the section of Appendix G that requires habitable space to be located above the DFE.
15. Please insert the language of G107 in its entirety, and all subsections of G107.2 and address each point by point. Provide an engineering report to substantiate each condition and finding as applicable. Please address how the proposed scope of work (dry floodproofing and flood log barrier system).

- a. G107.2.2 please provide a statement and reference supporting evidence that the proposed alteration will not increase flood levels in a floodway. Indicate if the property is within the floodway (this can be found on the FIRM).
- b. The engineering report should demonstrate that the granting of the variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, nuisances, fraud or victimization, etc. as shown on the conditions for variance G107.2.3.
- c. The engineering report should demonstrate how it meets the standards for variance under G107.3-that the danger of materials and debris may be swept onto other lands resulting in injury or damage, the danger to life and property, the susceptibility of the proposed development to flood damage and the effect on current and future owners, etc.
- d. Please describe if there is any emergency plan that will be implemented during a storm event.
- e. Please describe how the dry flood proofing and flood barrier log system will work to protect the property.
- f. Please describe how the location of the mechanicals is not detrimental to the residents of the subject building.

16. Financial hardship:

- a. Please describe the floodproofing work required for each scenario and quantify the costs for this work. Verify that these costs are incorporated and identified in the Financial Report. For example, dry floodproofing costs should be shown in the preliminary budget summary for the BSA Plan Alternative. For the Alternative plans, Appendix G appears to require wet floodproofing below the DE (G304.1.1.2) and only flood-damage resistant materials and finishes shall be utilized below the DFE (304.1.2.4).

Despite the project manager's distribution of this Notice of Comments to the applicant on November 7, 2022, and the project manager's request for various edits, submissions, and clarifications from the applicant to support the applicant's appeal pursuant to the relevant elements of B.C. § 107, the applicant failed to respond to the Notice from that date through the Board's final decision to dismiss this application on August 12, 2025.

The Board further stated at hearing that, while it allowed this subject application to be put on hold during the Board's review of the applicant's appeal under BSA Cal. No. 2022-44-A, Board staff began reaching out to the applicant regarding this subject application after May 5, 2024, when the Board denied BSA Cal. No. 2022-44-A and the

informal holding period thereby ended. Board staff made numerous unsuccessful attempts to communicate with the applicant about this subject application from that date in May 2024 through July 2025, including by email on May 22, 2024, July 15, 2024, September 11, 2024, November 20, 2024, November 22, 2024, February 12, 2025, February 13, 2025, March 5, 2025, March 7, 2025, April 10, 2025, April 17, 2025, April 25, 2025, May 7, 2025, July 21, 2025, July 25, 2025, July 28, 2025, and July 30, 2025. Additionally, the Board noted that it had scheduled this case for a tentative public hearing and subsequently postponed the hearing due to the applicant's lack of response on three occasions: December 9, 2024, February 24, 2025, and May 5, 2025.

Finally, the Board added that, because the application materials that the applicant submitted with the initial filing were inadequate, and because the applicant failed to address staff comments during the more-than three-year-long period that elapsed between the applicant's date of filing and the hearing on August 12, 2025, the Board lacked substantial evidence upon which to make a determination on the merits of the application.

VI. Decision

Based upon the foregoing, the Board finds that the applicant has failed to prosecute this application.

Therefore, it is Resolved, that the Board of Standards and Appeals does hereby *dismiss* this application.

Adopted by the Board of Standards and Appeals, August 12, 2025.

CERTIFICATION

This copy of the resolution
dated August 12, 2025
is hereby filed by the
Board of Standards and Appeals
on October 22, 2025.



Carlo Costanza
Executive Director