221-03-BZ
CEQR#03-BSA-220M
APPLICANT - Martyn & Don Weston, for 253 West 28th Street, Corp., owner.
SUBJECT - Application June 26, 2003 - under Z.R. §72-21 to permit the legalization of three existing residential units, located on the third, fourth and fifth floors, of a five story mixed use building, in an M1-1 zoning district, which is contrary to Z.R. §42-00.
PREMISES AFFECTED - 253/55 West 28th Street, north side, 105'-1" east of Eighth Avenue, Block 778, Lot 7, Borough of Manhattan.
COMMUNITY BOARD #5M
APPEARANCES -
For Applicant: Don Weston, Frank Angelino and Peter Mackie.
ACTION OF THE BOARD - Application granted on condition.
THE VOTE TO GRANT -
Affirmative: Chair Srinivasan, Vice-Chair Babbar, Commissioner Miele and Commissioner Chin..........4
Negative:..0
THE RESOLUTION -

WHEREAS, the decision of the Borough Commissioner, dated September 11, 2003, acting on Department of Buildings Application No. 102987314, reads, in pertinent part:

"Dwelling units are not permitted as-of-right in a M1-5 district as per sections 42-00 ZR and 42-133 ZR."; and

WHEREAS, a public hearing was held on this application on February 3, 2004 after due notice by publication in the City Record, with continued hearings on March 23 and July 13, 2004, and then to decision on September 21, 2004; the decision was deferred to November 8, 2004, on which date the matter was reopened, and then to decision on February 15, 2005; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by a committee of the Board, consisting of Chair Srinivasan, Vice-Chair Babbar, and Commissioners Miele and Chin; and

WHEREAS, this is an application under Z.R. § 72-21, to permit, within an M1-5 zoning district, residential use of three co-op units on the third, fourth and fifth floors of an existing building (Use Group 2), contrary to Z.R. §§ 42-00 and 42-133; and

WHEREAS, this application is brought on behalf of 253 West 28th Street Corp., a residential co-operative; and

WHEREAS, Community Board No. 5, Manhattan, recommends disapproval of this application; and

WHEREAS, the subject zoning lot is 49'-9" wide by 116'-11¼" deep, with a total lot area of 5,825 sq. ft., and is improved upon with a five-story plus cellar, 50' high co-op building with 27,778 sq. ft. of total floor area (the "subject building" or "building"); and

WHEREAS, the applicant states that the subject building was built in 1896 as a stable and wagon storage facility, changed to light manufacturing and furrier use in the 1930s, and left vacant in the mid-1970s; and

WHEREAS, the applicant further states that the building converted to a co-operative in 1979, and, in years subsequent, the first floor and cellar were sold to a nightclub, the second and fifth floors were sold to photographers, the third floor was sold to an artist, and the fourth floor was sold to an attorney; and

WHEREAS, the record indicates that the first floor and cellar level of the building are currently undergoing renovations to accommodate a nightclub (hereinafter, the "Club" or the "Lessee"), which plans to establish operations on these levels; and

WHEREAS, Certificate of Occupancy No. 87128 lists the following as legal uses of the building: cellar - boiler room & storage, dressing rooms, toilet rooms and storage rooms for Eating and Drinking Establishment at 1st floor; first floor - Eating and Drinking Establishment without restrictions Use Group No. 12; second floor - Photographic Studio; third floor - Art Studio; fourth floor - Offices; and fifth floor - Photographic Studio; and

WHEREAS, the applicant represents that three floors of the building have been used for residential purposes for more than twenty years; and

WHEREAS, both the Lessee and the owner of the shares allocable to the cellar and first floor co-op units (hereinafter, the "First Floor Owner") appeared in opposition to the subject application; and

WHEREAS, the applicant represents that the following are unique physical conditions inherent to the subject building and zoning lot, which create practical difficulties and unnecessary hardship in developing the entire building with a conforming use: (1) the ceilings are too low for most commercial or industrial uses; (2) the one small elevator is not suitable for most commercial or industrial uses; (3) the space is broken up with columns spaced at 18 ft. on center; (4) the total floor loading capacity is 88 pounds per square foot; (5) the floor plates are too small for most commercial and industrial users; (6) the electrical service is inadequate; (7) the building adjoins two zoning districts that permit residential use; (8) there is no off-street parking or loading; (9) the subject units could have qualified for Interim Multiple Dwelling status at one time; and (10) the Fashion Institute ("FIT") is directly across the street; and

WHEREAS, in a submission dated August 23, 2004, the Lessee disputes that any of the ten factors listed above constitute a unique physical condition inherent to the building or zoning lot; and

WHEREAS, the Board agrees that adjacency to residential districts, lack of off-street parking, potential qualification for IMD status and proximity to FIT should not be considered unique physical conditions; and

WHEREAS, however, the Board disagrees that the other factors, when considered together, could not properly be considered unique physical conditions, and notes that similar fact-patterns have been found sufficient to support the uniqueness finding in other cases; and

WHEREAS, in addition, in response to the contention of the Lessee that the subject building is not unique, the applicant made a submission which provided further explication of why the subject building is significantly different than others in the vicinity; and

WHEREAS, the applicant's financial consultant, in a submission dated January 4, 2005, provided an analysis of all buildings within a 400' radius of the subject site; and

WHEREAS, this analysis distinguished the subject building from other buildings in this radius that had different permitted uses, were in different zoning districts, or which were substantially smaller or larger in terms of stories, floor plate sizes, and/or lot sizes; and

WHEREAS, the analysis also eliminated for comparison purposes vacant land or land occupied by parking lots or garages; and

WHEREAS, the analysis showed that the subject building was different from the three remaining buildings which were possibly comparable to the subject building, explaining that one of the buildings was a larger, modern building on a corner lot, one was in a zone that allowed residential use as-of-right, and one was actually significantly smaller; and

WHEREAS, based upon its review of the record and its observations, the Board finds that the subject building is unique relative to neighboring properties, and notes that even if there were more buildings comparable to the subject building in the area, a finding of uniqueness would nevertheless not be precluded, so long as the comparable buildings were not the prevailing building form within the area; and

WHEREAS, however, the Board observes that five-story loft buildings with bulk parameters comparable to the subject building are not the predominant building form in the surrounding neighborhood; and

WHEREAS, accordingly, the Board finds that certain of the unique conditions mentioned above, namely, that (1) the low ceilings, small floor plates, antiquated electrical service, and small elevator are not suitable for most commercial or industrial uses, (2) the space is broken up with columns spaced at 18 ft. on center, and (3) the total floor loading capacity is deficient, when considered in the aggregate, create practical difficulties and unnecessary hardship in developing the entire site in strict conformity with current zoning; and

WHEREAS, the applicant has submitted a feasibility study, and subsequent amplifying submissions, which purport to show that a conforming proposal for the subject building would not result in a reasonable return; and

WHEREAS, the First Floor Owner contends that the original feasibility analysis is flawed because it analyzes the conforming use scenario based upon rentals from all five co-op units, but analyzes the proposed variance scenario only based upon rental value for the third through fifth floors; and

WHEREAS, in order to address this concern, the Board asked the applicant to analyze the entire building as a hypothetical rental proposal, on the theory that this would lead to consideration of the building's financial hardship in its entirety, which would provide a better measure of the building's economic viability for conforming uses; and

WHEREAS, in response, the applicant's financial consultant conducted such a study, and utilized the estimate of building value proposed by the First Floor Owner's financial expert; and

WHEREAS, the First Floor Owner's financial consultant questioned the use of this estimate as a true reflection of the building value, alleging that he proffered the figure not as a proposed acquisition cost, but as a representation of the return that could be realized from the investment of the individual unit owners when aggregated; and

WHEREAS, the Board notes that this is the equivalent of market value, and thus this estimate is an appropriate figure to use; and

WHEREAS, using this site valuation, the applicant's financial expert also stated that the estimate is an appropriate measure of current value, based upon an aggregate of average vacant land sales and the replacement value of the subject building; and

WHEREAS, the applicant's financial expert also notes that the original valuation estimate submitted with the first feasibility study was made over one year ago, and that updating of the land value was therefore necessary and appropriate; and

WHEREAS, accordingly, the Board agrees with the applicant that the revised building value estimate is reasonable; and

WHEREAS, the applicant's financial consultant concluded that a conforming use alternative did not realize a reasonable return, but that the proposed mixed-use alternative realized a modest return; and

WHEREAS, the First Floor Owner also questioned the methodology that the Board proposed to the applicant, and suggested that if an evaluation of the actual profit that each individual unit owner could make based upon acquisition and sales prices was undertaken, no hardship could be shown; and

WHEREAS, however, the Board notes that individual unit owner profit is not an appropriate gauge by which to measure hardship, for the obvious reason that an inflated acquisition price could lead to a hardship claim in every application; this problem is precisely the reason why the Board instead used an estimate of overall building value based upon the market; and

WHEREAS, moreover, the Board notes that the applicant was instructed to approach the analysis as a rental proposal for the entire building because the First Floor Owner alleged that the original analysis was, in part, not based upon the entire building; and

WHEREAS, the Board notes that the finding set forth at Z.R. § 72-21(b) requires an analysis of the entire zoning lot (and thus any building thereupon), which would make a full rental proposal a much more appropriate measure of hardship than an assessment of an individual unit owner's ability to make a profit on an acquisition and sale; and

WHEREAS, the Board notes that marketing attempts are often submitted or requested by the Board in the context of a variance application, but observes that no Board rule requires that such evidence be submitted in each and every case, as the Lessee contends; and

WHEREAS, here, such evidence would have been difficult to obtain given the fact that any marketing attempts would have to be initiated by the individual shareholder/occupants of the subject units, who did not have any motivation to market the units given the use of them for residential purposes; and

WHEREAS, moreover, here, the Board is able to render a determination as to the finding set forth at Z.R. § 72-21(b) in the absence of such evidence, as the revised feasibility study and subsequent submissions are sufficient to support the finding; and

WHEREAS, based upon its review of the record, the Board has determined that because of the subject lot's unique physical conditions, there is no reasonable possibility that development in strict conformance with the use provisions applicable in the subject zoning district will provide a reasonable return; and

WHEREAS, the applicant represents that the proposed variance, if granted, will not negatively impact the character of the community; and

WHEREAS, the applicant represents that the character of the community is mixed-use, and cites to, as illustrated on the submitted land use map, numerous residential, community facility, and residential-compatible uses in close proximity to the subject site, including FIT, some multiple dwellings, commercial uses, a religious institution, vacant lots, and parking garages; and

WHEREAS, based upon the evidence submitted, the Board agrees that the neighborhood in which the subject site is located is best characterized as mixed-use; and

WHEREAS, the Board also finds that the proposal only contemplates the legalization of three residential units, which is a small amount that is compatible with the mixed-use character of the neighborhood; and

WHEREAS, accordingly, the Board finds that the variance, if granted, will not negatively impact the character of the neighborhood; and

WHEREAS, the applicant also represents that the proposed variance, if granted, will not adversely impact adjacent conforming uses, including the Club in the cellar and first floors of the Building; and

WHEREAS, both the Lessee and the First Floor Owner contend that the likely sound levels that will emanate from the Club could be so significant that regardless of any sound attenuation measures taken by the applicant, there is no assurance that Noise Code violations would not be issued to the Club; and

WHEREAS, both the Lessee and the First Floor Owner argue that legalizing the third through fifth floors will give the occupants of those floors the legal right to complain to the City's Department of Environmental Protection about noise resulting from the Club's operations, and that the Club could be forced out of business as a consequence; and

WHEREAS, the First Floor Owner has provided expert testimony in support of these contentions; and

WHEREAS, the applicant has submitted its own expert testimony, which the applicant argues shows that Noise Code compliant levels could be achieved in the proposed residential units, with the installation of sound attenuation measures that the individual shareholders of the third, fourth and fifth floors have committed to undertaking; and

WHEREAS, the Board observes that since the Club is not in operation and no test can be conducted, the alleged harm that the Club might suffer if the residential units are legalized is speculative at best; and

WHEREAS, even so, the Board notes that if sound attenuation measures can indeed shield the residential units from the noise generated by the Club such that no Noise Code violation would result, then it is reasonable to conclude that there would be no potential adverse impact upon the Club; and

WHEREAS, the Board observes it need not determine which expert is correct, and instead conditions the grant made herein on Department of Buildings enforcement of a series of conditions requiring that the individual shareholders seeking legalization install and maintain sound attenuation and further requiring that a test be conducted within each of the proposed residential units, the result of which must show that no Noise Code violable condition exist in any of the units when the Club is in operation; and

WHEREAS, this condition will specify that no temporary or permanent certificate of occupancy shall be issued absent such a test report; and

WHEREAS, should the tests result show that the a Noise Code violable condition does in fact exist in the proposed residential uses, then no certificate of occupancy can be issued, and the units will not be legalized; and

WHEREAS, the Board finds that the conditions provide reasonable protection for the Club (should it open) from any potential impact due to the grant of the variance herein; and

WHEREAS, the Board notes that the series of conditions in not intended in any way to limit or otherwise compromise the Department of Environmental Protection's authority to enforce any provision of the Noise Code as necessary; and

WHEREAS, in sum, based on the above, the Board finds that the subject application, if granted, will not alter the essential character of the surrounding neighborhood or impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

WHEREAS, the Lessee argues that the failure of the occupants of floors three through five to take advantage of a residential conversion option through the Loft Law during the time period when these floors could have been converted constitutes a self-created hardship; and

WHEREAS, the Board disagrees, and notes that the claimed hardship is based upon the functional obsolescence for conforming use of the third through fifth floors; the fact that prior occupants did not avail themselves of the conversion option under the Loft Law is not relevant; and

WHEREAS, similarly irrelevant is the Lessee's claim that the fourth floor was recently purchased for commercial use, and that this prevents a claim of hardship based upon inability to use the space for commercial use; and

WHEREAS, the Board is aware that commercial properties are often purchased ostensibly as commercial properties, not in anticipation of actual commercial use, but in anticipation of a potential variance application, and that the finding set forth at Z.R. § 72-21(d) contemplates that this can legally occur; and

WHEREAS, Z.R. § 72-21(d) provides in part, "where all other required findings are made, the purchase of a zoning lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship"; and

WHEREAS, accordingly, the Board finds that the hardship herein was not self-created by the owner or a predecessor in title; and

WHEREAS, this proposal is the minimum necessary to afford relief; and

WHEREAS, therefore, the Board has determined that the evidence in the record supports the findings required to be made under Z.R. § 72-21; and

WHEREAS, the Board notes in passing that the First Floor Owner has made various allegations as to the conduct of the applicant concerning various contractual arrangements with the applicant that are not pertinent to the Board's deliberations on the variance application; and

WHEREAS, the project is classified as an Unlisted action pursuant to 6NYCRR, Part 617; 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. 03-BSA-220M dated June 26, 2003; 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 and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Hazardous Materials; Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; Construction Impacts; and Public Health; 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 issues a Negative Declaration, with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under Z.R. § 72-21, to permit, within an M1-5 zoning district, the legalization of residential use of three co-op units on the third, fourth and fifth floors of an existing building (Use Group 2), contrary to Z.R. §§ 42-00 and 42-133; on condition that any and all work shall substantially conform to drawings as they apply to the objection above noted, filed with this application marked "Received August 9, 2004" - (3) sheets; and on further condition:

THAT the individual shareholders with ownership interests in the co-op units on the third, fourth, and fifth floors of the subject building, or any of their successors, shall install, or shall ensure the installation of, at their own expense, sound attenuation measures within the building such that the db and dB(A) levels in the proposed residential units on the third through fifth floors are compliant with the City's Noise Code provisions applicable to buildings with residential occupancy, taking into consideration the sound levels from the nightclub use on the first floor;

THAT at all times, the individual shareholders, or their successors, shall monitor, maintain in good condition, and upgrade if necessary, the installed sound attenuation measures, such that the db and dB(A) levels in the proposed residential units on the third through fifth floors are compliant with the City's Noise Code provisions applicable to buildings with residential occupancy, taking into consideration the sound levels from the nightclub use on the first floor;

THAT the above conditions shall be listed on the certificate of occupancy;

THAT no temporary or final certificate of occupancy legalizing residential use on the third through fifth floors of the subject building shall be issued unless and until a test report from the Department of Environmental Protection is submitted to the Department of Buildings;

THAT this test report must show that the db and dB(A) levels in the proposed residential units are compliant with the City's Noise Code provisions applicable to buildings with residential occupancy in effect at the time of the test;

THAT this test shall be conducted when the nightclub proposed for the first floor and cellar level of the subject building is in operation and playing music;

THAT this resolution does not constitute in any way a final legalization of the proposed residential use on the third through fifth floors of the subject building; final legalization of the residential uses shall only occur upon issuance of a certificate of occupancy;

THAT this set of conditions is not intended to limit in any way the Department of Environmental Protection's authority to enforce the Noise Code, either as it exists currently or as modified, at any time;

THAT all light and air requirements per the Multiple Dwelling Law, and all Home Occupation requirements, shall be as reviewed and approved by the Department of Buildings;

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

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

THAT the Department of Buildings 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) and/or configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, February 15, 2005.

A true copy of resolution adopted by the Board of Standards and Appeals, February 15, 2005.
Printed in Bulletin No. 8, Vol. 90.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r