

280-09-A

APPLICANT – NYC Board of Standards and Appeals
SUBJECT – Review of Board decision pursuant to Sec 1-10(f) of the Board’s Rules and 666(8) of the City Charter of an appeal challenging the Department of Building’s authority under the City Charter to interpret or enforce provisions of Article 16 of the General Municipal Law relating to the construction of a proposed 17 story residential building. R10A zoning district.

PREMISES AFFECTED – 330 West 86th Street, south side of West 86th Street, 280 feet west of the intersection of Riverside Drive and West 86th Street, Block 1247, Lot 49, Borough of Manhattan.

COMMUNITY BOARD #7M

APPEARANCES –

For Applicant: Albert Fredericks and Ken Kurland of HPD.

ACTION OF THE BOARD – Appeal granted.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, the appeal comes before the Board in response to a Final Determination letter dated July 13, 2009 and affirmed on September 8, 2009, from the Manhattan Borough Commissioner of the Department of Buildings (“DOB”) (the “Final Determination”) addressed to a representative of the subject property owner (330 West 86th Street LLC, the “Appellant”)1, with respect to DOB Application No. 110193102; and

WHEREAS, the Final Determination states, in pertinent part:

Article 16 of the General Municipal Law (‘GML’) limits development of subject buildings to low rise structures with one to four dwelling units. As your client’s proposed development is more than 75 feet in height, it is a ‘high rise’ as defined in the New York City Building Code and thus not in compliance with the requirements of the GML, the applicability of which, to the subject property has been confirmed by the Court of Appeals decision in 328 Owners Corp. v. 330 West Oaks Corp. and the City of New York, reported at 8 N.Y. 3d 372 (2007); and

WHEREAS, a public hearing was held on this

appeal on January 26, 2010, after due notice by publication in *The City Record*, with a continued hearing on March 23, 2010, and then to decision on April 20, 2010 (the “April Resolution”); and

WHEREAS, subsequent to the Board’s decision, the Board received (1) a request from the Department of Housing Preservation and Development (“HPD”) to modify, but not reverse, the April Resolution to eliminate a portion of the determination, (2) a request from a representative of two neighboring buildings at 328 West 86th Street and 332 West 86th Street (the “Neighbors”) that the case be re-heard, vacated, or dismissed based on procedural concerns, (3) service of an Article 78 proceeding from the Neighbors (328 Owners Corp. and 86th Apartment Corporation v. Board of Standards and Appeals et al, Index No. 106677/10), and (4) submissions from the Appellant in response to HPD and the Neighbors and stating opposition to the request to modify the April Resolution or otherwise disturb the decision based on procedural grounds; and

WHEREAS, the Board received written testimony in opposition to the April Resolution and in support of HPD’s request from City Council Member Gale Brewer; State Senator Eric T. Schneiderman also provided written testimony in opposition to the April Resolution; and

WHEREAS, additionally, certain community members provided written testimony in opposition to the proposed construction; and

WHEREAS, the Board re-opened the case to consider whether to modify its decision and a public hearing was held on this application on June 15, 2010, after due notice by publication in *The City Record*, and then to decision on July 13, 2010; and

WHEREAS, at the public hearing on June 15, 2010, the Board voted in favor of reviewing the April Resolution, pursuant to § 1-10(f) of the Board’s Rules of Practice and Procedure; and

WHEREAS, accordingly, this resolution supersedes the resolution dated April 20, 2010; and

WHEREAS, a representative of HPD, the Appellant, and the Neighbors provided testimony at the hearing; and

WHEREAS, City Council Member Gale Brewer, a representative of State Assembly Member Linda Rosenthal, a representative of the Coalition for a Livable West Side, a representative of the West 86th Street Neighborhood Association, and a representative of Community Board 7 provided testimony in opposition to the application and in support of HPD’s request to modify the Board’s decision; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Vice-Chair Collins, Commissioner Hinkson, and Commissioner Ottley-Brown; and

WHEREAS, DOB and the Appellant have been

1 The Board notes that the ownership of the property has changed since the issuance of the Final Determination and the commencement of the appeal, but that counsel for the original Appellant is authorized by the new owner to pursue the appeal and has the same interest as the original owner. “Appellant” signifies prior and current owner.

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represented by counsel throughout this appeal; and

WHEREAS, during the original hearing process, Board staff reached out to HPD to inquire if it had a direct response to the matters of the appeal; and

WHEREAS, HPD ultimately submitted on the matters raised during the appeal, in support of DOB's position as expressed through its submissions and testimony; and

Procedural History

WHEREAS, the subject appeal concerns the proposed construction of a 17-story (including penthouse) four-unit building at 330 West 86th Street on a site that is currently occupied by a five-story eight-unit building, within an R10A zoning district; and

WHEREAS, the site is the subject of a 1999 Urban Development Action Area Project ("UDAAP"), which, at HPD's request, the City, which had acquired the site through an *in rem* proceeding, conveyed to the then-tenants – organized as 330 West Oaks Corp. ("Oaks Corp.") – through the accelerated UDAAP process; and

WHEREAS, in approving the project, City Council waived the otherwise applicable requirements that a UDAAP initiative be part of a designated Urban Development Action Area ("UDAA") and undergo the more extensive Uniform Land Use Review Procedure ("ULURP") review; and

WHEREAS, in 2001, Oaks Corp. sold the building to the Appellant; and

WHEREAS, in anticipation of that sale, the cooperative corporation that owns the adjacent building to the east at 328 West 86th Street ("328 Owners Corp."), commenced litigation against Oaks Corp. and the City asserting that (1) the site could only be used for rehabilitation or conservation of the existing building or the construction of a new one to four unit dwelling, (2) the new owner must adhere to the restrictions associated with the grant and the original owner, and, in the alternative, and (3) the City's conveyance to Oaks Corp. should be declared null and void; 328 Owners Corp. added the Appellant as a party to the litigation after it acquired the site; and

WHEREAS, the City asserted cross claims that (1) the site could only be used for rehabilitation or conservation of the existing building and (2) the owner and all successors must be restricted to using the site as described in the associated deed (the "Deed"); and

WHEREAS, the Court of Appeals, by decision dated April 3, 2007, determined that (1) there is a restriction limiting the use of the property to the rehabilitation or conservation of the building or the construction of a new one to four unit building, and (2) such a restriction is binding on subsequent owners of the site, including the Appellant (although the Court states that a property owner may seek to have the restrictions extinguished, pursuant to Real Property Actions and Proceedings Law § 1951, so that they would not run in

perpetuity); and

WHEREAS, the Court noted that Article 16 of the General Municipal Law ("GML"), which sets forth the UDAA Act, should be read into the Deed, but that neither the Deed nor the GML limits the construction on the site to conservation of the existing building; and

WHEREAS, the outstanding question about the effective period of the Deed restrictions is not the subject of this appeal, which is limited to the Final Determination; and

WHEREAS, after the Court of Appeals decision, the Appellant filed an application at DOB for a new building permit in June 2008; the Appellant represents that a 17-story building has been under DOB review since at least 2000 and that the building complies with all relevant zoning requirements; and

WHEREAS, on May 7, 2009, DOB issued a notice of objections, which states that per the GML:

The proposed height fails to comply with and is in excess of the use restrictions of Article 16 of the General Municipal Law, which restrictions have been confirmed by and are reflected in the final judgment and permanent injunction affirmed by NY Court of Appeals in 328 Owners Corp. v. 330 West Oaks Corp., and the City of New York, reported at 8 N.Y.3d 372 (2007). The proposed building meets the definition of high rise per Building Code because it has occupied floors located more than 75 feet (22 860 mm) above the lowest level of fire department vehicle access; and

WHEREAS, the May 7, 2009 objection is the basis for the Final Determination on appeal; and

WHEREAS, the Appellant asserts that DOB's determination is erroneous because (1) enforcement of the UDAA Act falls outside of DOB's authority under the City Charter and (2) nothing in the UDAA Act or in any administrative determination, court decision or legal instrument concerning the site imposes such a height limit; and

Relevant Provisions of the the General Municipal Law and the Deed

WHEREAS, the source of the Deed language is within the GML's provisions setting forth the criteria for the accelerated UDAAP process; GML §§ 693 and 694, which state, in pertinent part:

. . . if a proposed urban development action area project is to be developed on an eligible area and consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by local zoning, the governing body . . . may waive the area designation requirement. (GML § 693)

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Any approval of an urban development action area project shall be in conformance with the standards and procedures required for all land use determinations pursuant to general, special or local law or charter . . . (GML § 694(5)); and WHEREAS, the pertinent provision of the Deed between the City and Oaks Corp. is as follows:

WHEREAS, the project to be undertaken by Sponsor ('Project') consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by existing zoning. . . ; and The Appellant's Primary Argument

- Enforcement of the UDAA Act is Beyond DOB's Statutory Jurisdiction

WHEREAS, the Appellant, citing Abiele Contracting, Inc. v. New York City School Construction Authority, 91 N.Y.2d 1, 10 (1997); Finger Lakes Racing Ass'n. Inc. v. New York State Racing and Wagering Board, 45 N.Y.2d 471, 480, asserts that an administrative agency can only act within the scope of the authority granted it by statute and that a determination made in excess of that authority is unlawful and void; and

WHEREAS, the Appellant cites to City Charter § 643 for the function of DOB; City Charter § 643, states, in pertinent part:

The department shall enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, Multiple dwelling law, labor law and other laws, rules and regulations as may govern construction, alteration, maintenance, use occupancy, safety, sanitary conditions, mechanical equipment and inspection of buildings or structures of the city; and

WHEREAS, the Appellant cites to City Charter § 645, which provides that the Commissioner of Buildings is empowered:

(1) to examine and approve or disapprove plans for the construction or alteration of any building or structure. . . (2) to require that the construction or alteration of any building or structure, including the installation or alteration or any service equipment therein, shall be in accordance with the provisions of law and the rules, regulations and orders applicable thereto. . . (3) to issue certificates of occupancy for any building or structure situated in the city; and

WHEREAS, the Appellant asserts that DOB's review, pursuant to the Charter, is limited to the enforcement of technical standards found in the Building Code, the Zoning Resolution, and the Multiple Dwelling Law; and

WHEREAS, the Appellant relies on Matter of

Tafnet Realty Corp. v. New York City Dep't. of Buildings, 116 Misc.2d 609 (Sup. Ct. NY Co. 1982), which involved DOB's issuance of housing violations against a hotel, for matters including rent control regulations and tenant harassment; and

WHEREAS, the Tafnet court held that:

the duties of the Buildings Commissioner, as set forth in the city charter, deal 'exclusively' with structural and technical matters: the enforcement of the Building Code, the inspection of premises and the review of plans and issuance of permits. . . General living conditions are not within [the Commissioner's] jurisdiction; neither are violations of other laws, civil, or criminal, which may occur within buildings or structures . . . It is improper for the Buildings Commissioner to use revocation of a building permit as punishment for activity outside the scope of his jurisdiction, and which he has no independent knowledge, as a means of effecting policies of other city agencies; and

WHEREAS, the Appellant asserts that the UDAA Act does not establish technical standards and specific regulations applicable to the construction, alteration or use of buildings but, rather, addresses community preservation and redevelopment goals; and

WHEREAS, the Appellant asserts that the UDAAP program is administered by HPD and DOB does not have a specific role in its implementation; and

WHEREAS, the Appellant asserts that GML § 692 and City Charter § 1802(3) grant HPD the authority for implementation and oversight of UDAAP projects and further that HPD has its own set of regulations which describe procedure and restrictions with more specificity; and

WHEREAS, GML § 692(4) (Definitions) identifies HPD's authority and states:

'Agency'. The officer, board, commission, department, or other agency of the municipality designated by the governing body, or as otherwise provide by law, to carry out the functions vested in the agency under this article or delegated to the agency by the governing body in order to carry out the purpose and provisions of this article, except that in a city having a population of one million or more, the term 'agency' shall mean a department of housing preservation and development; and

WHEREAS, City Charter § 1802(3) (Department of Housing Preservation and Development – Powers and Duties of the Commissioner) includes:

all functions of the city, and all powers, rights and duties as provided by any federal, state or local law or resolution, relating to slum clearance, slum prevention and urban renewal;

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neighborhood conservation; prevention and rehabilitation of blighted, substandard, deteriorated or unsanitary areas, and publicly-aided and public housing . . . ; and

WHEREAS, further, the Appellant asserts that the primary mechanism for ensuring compliance with the restrictions of a particular UDAA project are set forth in a deed or lease or other instrument associated with the City's conveyance of the property; and

WHEREAS, the Appellant asserts that HPD has the enforcement authority and it may enforce the restrictions through its own process or in collaboration with the New York City Law Department; and

WHEREAS, the Appellant asserts that in the absence of express authority to DOB for the enforcement of UDAA-related interests, HPD maintains the appropriate authority; and

WHEREAS, the Appellant distinguishes the Building Code, Zoning Resolution and Multiple Dwelling Law from the UDAA Act, asserting that the latter does not establish technical standards and specific regulations applicable to construction, alteration or use of buildings but which is designed for public policy initiatives; and

WHEREAS, the Appellant states that the UDAA Act is similar to programs such as Urban Renewal and those administered by the Empire State Development Corporation, in which publicly-owned property is conveyed to private entities, subject to various restrictions designed to ensure that the property will be redeveloped and used in a way that benefits the surrounding community and the general public and that the UDAA Act is designed to further broad community preservation and redevelopment goals and does not establish technical standards that are within DOB's authority; and

WHEREAS, drawing a parallel to the Urban Renewal program, the Appellant cites to a letter from DOB, dated August 2, 2006, in response to residents' inquiry about the enforcement of Urban Renewal provisions at a site subject to an Urban Renewal Plan and DOB stated that it did not interpret or enforce the noted contract terms and referred the inquiry to HPD; and

WHEREAS, specifically, DOB states that "The Department of Buildings does not interpret or enforce provisions of the contracts referenced in your letter in its permitting process" and refers the concerned party to HPD, "which is the agency upon which has devolved primary responsibility for overseeing the contracts you have referenced"; and

WHEREAS, DOB disagrees with the Appellant and states that its Charter authority encompasses the UDAA Act for purposes of determining whether a new building application conforms with legal requirements; and

WHEREAS, DOB asserts that the enforcement of the UDAA Act, pertaining to new construction on accelerated UDAA sites, such as the subject site, is within its jurisdiction; and

WHEREAS, DOB cites to its broad authority as set forth in City Charter §§ 643 and 645, noted above; and

WHEREAS, DOB asserts that nothing in the express language of the Charter prohibits it from considering the provisions of the UDAA Act in connection with new building applications; and

WHEREAS, DOB states that HPD does not have a statutory role in the disposition of a new building application or in the enforcement of the UDAA Act's provisions pertaining to new construction; and

WHEREAS, DOB states that the Law Department has advised that under the UDAA Act, HPD's role in accelerated UDAA projects consists of selecting City-owned properties for disposition pursuant to the statute, selecting grantees, negotiating terms, obtaining necessary public approvals, drafting the deed and conducting the closings; and

WHEREAS, accordingly, DOB asserts that HPD's role ends after the disposition and that DOB has the authority to enforce provisions of law, but not the Deed, which remains subject to HPD; and

WHEREAS, DOB states that, in the subject case, it is not enforcing the Deed, but rather the law; and

WHEREAS, DOB states that the UDAA Act sets forth specific limitations as to what may or may not lawfully be constructed upon the site and, thus, the provisions fall within its purview; and

WHEREAS, DOB states that the UDAA Act is silent as to the authority to enforce construction limitations (as opposed to Deed restrictions) and, thus, it is appropriately within DOB's authority since it is charged with enforcing construction laws, regulations and rules upon buildings and structures within New York City; and

WHEREAS, DOB distinguishes UDAA Act enforcement responsibilities, which it assumes because it finds that no other agency is identified as enforcing it, from the provisions at issue in *Tafnet*, where the Court identified the operative agencies who had enforcement powers, rather than DOB; and

WHEREAS, DOB asserts that in the absence of express authority, it may invoke broad Charter authority because no other agency has broad authority to enforce construction-related regulation; and

WHEREAS, HPD agrees with DOB that DOB has jurisdiction to enforce the UDAA Act; and

WHEREAS, HPD submits that DOB exercises jurisdiction from a practical standpoint because only DOB reviews a proposal at its inception and could stop a project before construction begins; and

WHEREAS, HPD asserts that its process of enforcement would be less efficient than that exercised by DOB because it could not raise a claim that a deed was violated until after the property owner demolished the

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building and construction on a new one began; and

WHEREAS, accordingly, although all parties – the Appellant, DOB, and HPD - agree that HPD has jurisdiction over the Deed, they disagree as to which agency maintains jurisdiction to enforce the UDAA Act; and

The Appellant's Alternate Argument

- There was Not a Sufficient Basis for DOB to Issue the Objection

WHEREAS, the Appellant has stated that its primary argument is that DOB lacks the authority to enforce the UDAA Act, but that, if the Board were to disagree, and find that DOB acted appropriately in the subject case, then, it proffers the alternate argument that even if the UDAA Act were within DOB's jurisdiction, there is no basis for the requirement that a new building be low-rise as defined by the Building Code; and

WHEREAS, the Appellant asserts that the UDAA Act provides procedural guidelines as to when the accelerated UDAAP is permitted, including instances where the project “consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by local zoning . . .” See GML §§ 693, 694(5) and 695(6)(d); and

WHEREAS, the Appellant asserts that the UDAA Act's only reference to low-rise structures is found in GML § 694(1), which states that “the agency shall prepare or cause to be prepared, with provisions which, where appropriate, are expressly designed to encourage and stimulate businesses experienced in the development of one to four family low-rise residential structures or minority owned enterprises . . .”; and

WHEREAS, the Appellant finds that the noted provision is to be read broadly and is far from establishing a low-rise mandate for all UDAAP projects; and

WHEREAS, the Appellant asserts that the language of the statute is clear and unambiguous and thus should be construed so as to give effect to its plain meaning and that the only restriction to projects within the accelerated UDAAP program are that it be limited to “the construction of one to four unit dwellings . . . without any change in land use permitted by local zoning . . .”; and

WHEREAS, the Appellant states, similarly, that the Mayor's and City Council's resolutions associated with the UDAA Act and land disposition nor the Deed which effectuated the conveyance to Oaks Corp. contain any provision that limits new construction to a low-rise building or imposes any other building height limit; and

WHEREAS, the Appellant states that GML § 695(5) provides that any deed conveying UDAAP project property to a private entity shall contain the provisions describing and restricting the use of the property; the pertinent language about the construction is on the first page of the Deed, as noted above; and

WHEREAS, DOB asserts that the legislative history

and judicial interpretation of the UDAA Act establish bright-line, nondiscretionary requirements that new buildings subject to the UDAA Act must consist solely of one to four-unit dwellings, and that such must be low-rise; and

WHEREAS, accordingly, DOB maintains its position that the proposal does not comport with relevant provisions of the UDAA Act because the proposed 17-story building is not low-rise, as defined at Building Code § 403.1; and

WHEREAS, DOB interprets there to be a restriction to one- to four-unit low-rise buildings based on the (1) identification of such language in the legislative history and (2) its interpretation of New York City Coalition for the Preservation of Gardens v. Giuliani, 175 Misc. 2d 644 (Sup. Ct. N.Y. Co., 1997), an Article 78 proceeding that challenged a plan to replace community gardens on City-owned lands with new development through the accelerated UDAAP mechanism; and

WHEREAS, DOB asserts that the proposed building, which is neither low-rise, per the Building Code, nor in-kind replacement of the existing five-story building creates non-compliance with the Building Code's definition of low-rise and the building plans cannot be approved; and

WHEREAS, DOB states that a height limitation was not in the Deed because it was HPD's intent that the building would be conserved and not reconstructed; and

WHEREAS, HPD concurs with DOB that the text, legislative history, and judicial interpretation of the UDAA Act establish clear, nondiscretionary requirements that new buildings on subject sites are limited to one- to four-unit dwellings that are low-rise; and

The Board's Determination

WHEREAS, pursuant to § 1-10(f) of the Board's Rules of Practice and Procedure, the Board may on its own motion review its decision and reverse or modify it provided that “no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified”; and

WHEREAS, as noted, the Board, on its own motion at the June 15, 2010 public hearing, voted to review its decision; and

WHEREAS, the Board agrees that DOB has broad powers under the Charter to review and enforce construction-related regulations; and

WHEREAS, the Board appreciates that in certain instances DOB has express authority and, in other instances, it derives its authority from a more general understanding of the Charter powers and a recognition of DOB's unique position as the reviewer of building plans and issuer of building permits; and

WHEREAS, the Board notes that there may be instances where DOB has concurrent authority with

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another agency; and

WHEREAS, the Board notes that concurrent authority may manifest as multiple agencies, whose approval is required for a single application, review different elements of the same application; this includes instances when, in the process of reviewing plans, DOB may be alerted to another agency's jurisdiction, as it is with landmarks, wetland, and flood hazard regulations and thus a form of concurrent jurisdiction is evident; and

WHEREAS, the Board notes that DOB provided examples of concurrent jurisdiction with other agencies, but the Board distinguishes those examples from the subject of the appeal because the proffered agencies maintain a separate review process and enforcement practice; and

WHEREAS, the Board agrees with DOB that it exercises a range of so-called enforcement practices from direct to indirect, when otherwise not restricted from enforcement, and that a broad reading of the Charter authority suggests that elements of the UDAA Act could fit within DOB's enforcement powers; and

WHEREAS, however, the Board respectfully disagrees that the subject criteria DOB seeks to enforce, and addresses in its Final Determination, is within its authority; and

WHEREAS, the Board's conclusion arises from the following: (1) the Appellant states, and the Board agrees, that the UDAA Act is a statute related to policy and process, which can be distinguished from bodies of technical regulations, (2) the Appellant states, and the Board agrees, that unlike in the concurrent jurisdiction examples, DOB would generally not be aware that a project was subject to UDAAP because that is not one of the myriad criteria identified in DOB applications, and (3) the Board finds that it is not clear that DOB consistently reviews and enforces UDAA Act-related criteria in its approval process; and

WHEREAS, specifically, as to the nature of the UDAA Act, the Appellant states, and the Board agrees, that the UDAA Act, which concerns community preservation and redevelopment goals, can be distinguished from bodies of technical regulations such as the Zoning Resolution or Building Code, which are clearly within DOB's jurisdiction; and

WHEREAS, as to DOB generally being aware that a site is subject to UDAAP, it is not among the criteria available in the Buildings Information System and would not be within the scope of DOB's review process; rather, the UDAAP criteria is set forth within a deed established with HPD; and

WHEREAS, as to DOB's practice, DOB has not asserted that it has a method for identifying and reviewing UDAA Act criteria; and

WHEREAS, the Board notes that HPD recognizes that Article 16 of the GML names HPD specifically and identifies it as the agency charged with the responsibility

of implementing the UDAA Act, and that HPD states that it has been implementing the UDAA Act for several decades; and

WHEREAS, as to HPD's assertions about procedural efficiency, the Board disagrees that DOB should be recognized as the enforcement agency because it is in a better position than HPD to monitor compliance because, as noted, there is not a mechanism to alert DOB to a project's UDAAP status in the course of its ordinary plan review and the Board finds that HPD would have the ability to oppose a project that does not comport with its deeds prior to the completion of demolition and commencement of new construction; and

WHEREAS, the Board accepts that DOB has broad authority and that it may identify matters during its plan review, which are not generally before it and additionally the Board finds it reasonable for DOB to alert another agency when it identifies a non-complying condition, pursuant to a construction-related or other regulation; and

WHEREAS, however, the Board agrees with the Appellant that the provisions of the UDAA Act at issue in this appeal are not within the scope of DOB's general enforcement power under the Charter and that, rather, they lie within HPD's jurisdiction as set forth in the Charter and the UDAA Act; and

WHEREAS, the Board's determination is limited to the facts of the subject appeal; the Board acknowledges that there may be UDAA Act, or related provisions, not considered during the course of the subject appeal, that are within DOB's purview pursuant to its Charter power; and

WHEREAS, however, in this instance, DOB does not have authority to enforce the GML or the UDAAP provisions and therefore, the threshold question of jurisdiction is not met; and

WHEREAS, the Board has reviewed the secondary arguments: (1) from the Appellant that the UDAA Act language is unambiguous and does not set forth a height limit for the subject building and (2) from DOB and HPD that the legislative history and case law inform the UDAA Act establish a required height limitation of 75 feet on the subject site; and

WHEREAS, because the Board has determined that DOB does not have the authority to enforce the noted provisions in this instance, and since it finds that it is within HPD's authority, which the Charter has not granted the Board the jurisdiction to review, the Board declines to evaluate the merits of the Appellant's alternate argument, and DOB and HPD's rebuttals, on the question of height restrictions; and

WHEREAS, the Board notes that the Appellant asserts that it will be prejudiced by a modification of the decision, but the Board finds that (1) the Appellant's primary argument in the original appeal was that DOB lacks jurisdiction to enforce the noted provisions of the

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UDAA Act, (2) the Appellant asserts that the substantive questions on restrictions on the construction have already been answered in another forum, (3) the Board's review of its April Resolution does not constitute a reversal, and (4) the question of prejudice, as set forth in the Rules, is limited to whether or not the Appellant has acted in reliance on the prior decision; since the April Resolution and the modified decision both allow for the Appellant to proceed at DOB, the Board finds the argument about prejudice unpersuasive; and

WHEREAS, the Neighbors, community members, and elected officials raised other concerns including those about notification, a change in ownership of the site, and matters that were beyond the scope of a review of the April Resolution; and

WHEREAS, the Board notes that its Rules do not require notification of neighbors, the Community Board, or elected officials in interpretative appeals and that a change in ownership has not affected the Appellant's standing to pursue the appeal; and

WHEREAS, the Board notes that, although the Neighbors assert that the specifics of the case, involving ongoing litigation, warrants the Board exceeding the requirements of its Rules, they do not establish any basis for such action and the Neighbors concede that the Board has followed its Rules; and

WHEREAS, as noted, the Board does not find the change in ownership of the site from one party with interest in the appeal to another party with interest in the appeal, to have any bearing on the substantive matters before it; and

WHEREAS, accordingly, the Board has not found the supplemental procedural arguments to be availing; and

WHEREAS, the Board concludes that (1) the Board agrees with the Appellant's primary argument that DOB exceeded its authority by enforcing the GML in the subject matter, and (2) since the Board accepts the Appellant's primary argument, it declines from taking a position on the alternate argument, the analysis of which relies on a finding that DOB appropriately exercised its authority in enforcing the GML in the subject matter.

Therefore it is Resolved that the instant appeal, seeking a reversal of the Final Determination of the Manhattan Borough Commissioner, dated July 13, 2009, determining that the building height is limited to low-rise construction, is hereby granted.

Adopted by the Board of Standards and Appeals,
July 13, 2010.

**A true copy of resolution adopted by the Board of Standards and Appeals, July 13, 2010.
Printed in Bulletin Nos. 27-29, Vol. 95.**

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.