299-82-BZ
APPLICANT – Bryan Cave LLP/Robert S. Davis, Esq., for 10 Stanton Owners LLC, Chrystie Land Assoc. LLC c/o Sukenik, Segal & Graff, P.C.
SUBJECT – Application May 4, 2012 – Amendment to a previously granted variance (§72-21) which allowed a residential building. Proposed amendment would permit a new mixed use hotel and residential building on the subject zoning lot. C6-1 zoning district.
PREMISES AFFECTED – 207-217 Chrystie Street, northwest corner of Chrystie Street and Stan Street, Block 427, Lot 2, 200, Borough of Manhattan.
COMMUNITY BOARD #3M
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez 5
Negative:.....0
THE RESOLUTION –

WHEREAS, this is an application for a reopening and an amendment to an existing variance, to allow a modification to the site plan to reflect a second building; and

WHEREAS, a public hearing was held on this application on October 16, 2012, after due notice by publication in The City Record, and then to decision on December 11, 2012; and

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

WHEREAS, Community Board 3, Manhattan, recommends approval of this application; and

WHEREAS, a representative of the Tenant Association of 10 Stanton Street provided testimony in support of the application, noting specifically the proposed improvements to open space and the inclusion of new communal open space on the roof of the existing building at the site; and

WHEREAS, certain neighbors, including Sperone Westwater (the "Gallery"), the Lower East Side Preservation Initiative, the New Museum, the Bowery-Stanton Block Association, and the Bowery Alliance of Neighbors provided testimony in opposition to the application (the "Opposition"); and

WHEREAS, the Opposition's primary assertions are (1) there will be significant environmental impacts if the Board approves the application such that the project is subject to environmental review per the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review (CEQR) regulations, and (2) the scale of the proposed building is incompatible with the surrounding area; and

WHEREAS, the Opposition raises concerns about the potential adverse impacts associated with: (1) the elimination of open space, which it contends was important to the Board's consideration of the original variance; (2) impaired views from the Sara Delano Roosevelt Park and shadows across it and the Liz Christy/Bowery-Houston Community Garden; (3) the incompatibility of the height with surrounding lowrise buildings; and (4) the blocked and impaired views of adjacent buildings, including the Gallery; and

WHEREAS, the subject zoning lot consists of Tax Lots 2 and 200, with frontage on Stanton Street, Chrystie Street, and the Bowery, and has a lot area of approximately 57,135 sq. ft.; and

WHEREAS, the site is located within a C6-1 zoning district; and

WHEREAS, the Lot 2 portion of the site is occupied by a nine-story multiple dwelling building, with a height of 84'-6", floor area of 146,484 sq. ft., and an FAR of 2.56 (the "Existing Building"); and

WHEREAS, the applicant proposes to build a 25-story mixed-use hotel/residential building containing hotel use on floors 1-18 and residential apartments on floors 19-25 with 195,560 sq. ft. of total floor area, and a height of 274 feet (289 feet including bulkhead) on the Tax Lot 200 portion of the site (the "New Building"); and

WHEREAS, together, the Existing Building and the New Building will have 179,894 sq. ft. (3.15 FAR) of residential floor area and 162,150 sq. ft. (2.84 FAR) of hotel floor area for a total of 342,044 sq. ft. (5.99 FAR) across the site; and

WHEREAS, the applicant states that a maximum residential FAR of 3.42 and a maximum commercial FAR of 6.0 is permitted on the site; and

WHEREAS, the applicant states that the New Building complies with all zoning requirements and that no variance of any zoning provision is required; and

WHEREAS, accordingly, the applicant states that the purpose for the amendment is to substitute the new site plan, reflecting the New Building, for the site plan approved by the prior approval; and

WHEREAS, on June 11, 1982, under the subject calendar number, the Board granted a variance of the applicable height and setback regulations of a portion of the then-proposed Existing Building to allow for a "minor intrusion into the sky exposure plane" of portions of the upper stories (the "1982 Approval"); and

WHEREAS, as additional background, the applicant provides that in January 1970, acting through the Department of Housing Preservation and Development (HPD), the City of New York established the Cooper Square Urban Renewal Plan (URP) for a five-block area between the Bowery and Second Avenue/Chrystie Street from East 5th Street to Stanton Street (the Cooper Square Urban Renewal Area); and

WHEREAS, on November 16, 1982, the City Planning Commission approved two Uniform Land Use Review Procedure (ULURP) applications related to the zoning lot including the land disposition of the zoning

lot to a developer; and

WHEREAS, the private developer and HDC entered into a housing assistance payment contract with HUD and agreed to maintain the Existing Building as Section 8 housing for a term of 20 years; and

WHEREAS, at the time of the 1982 Approval, the zoning lot comprised Tax Lots 1, 47-51 and parts of Tax Lots 4 and 27; it was subsequently merged into Tax Lot 1 prior to development of the Existing Building; in 2009, Tax Lot 1 was subdivided into Tax lots 2 and 200; and

WHEREAS, the Existing Building was constructed on the Tax Lot 2 portion of the zoning lot and the remainder of the zoning lot was occupied by an accessory residential parking lot for 20 cars and landscaped open space; and

WHEREAS, the applicant states that on February 13, 2010, the Cooper Square URP expired and the obligation to maintain the Existing Building as Section 8 housing will expire on June 25, 2015; and

WHEREAS, the applicant states that by agreement with the Tenant Association of 10 Stanton Street, the applicant will continue to apply for federal housing subsidies for the Existing Building through 2035; and

WHEREAS, the applicant notes that a subway tunnel for the B and D lines runs beneath the portion of the site closest to Chrystie Street, so to avoid construction above or near the subway tunnel, the street wall of the New Building will be located approximately 66 feet from Chrystie Street; and

WHEREAS, the applicant asserts that the height of 274 feet (289 feet to the top of the mechanical bulkhead) fits well within the Chrystie Street and Stanton Street sky exposure planes and it therefore complies with C6-1 zoning with respect to height and setback (unlike the Existing Building); and

WHEREAS, the applicant proposes 34,480 sq. ft. of open space, which is slightly more than the open space required by the underlying zoning; and

WHEREAS, further, the applicant notes that it does not request any increase or change to the variance of the height and setback regulations granted for the Existing Building; and

WHEREAS, in support of its position that none of the ZR § 72-21 findings of the original variance are implicated, the applicant states that the subway tunnel restricted the placement of the Existing Building and that subway tunnel still exists and affects the development of the site, so the (a) finding is not implicated; and

WHEREAS, as to the (b) finding, the applicant cites to the Board's prior decision in BSA Cal. No. 885-78-BZ (120 West 25th Street) in which it approved a proposal for a site subject to a variance to transfer unused development rights to an adjacent site, based on facts including that 30 years had passed since the initial approval and that at the time of the earlier grant there was not any demand for and therefore no value to the excess development rights; and

WHEREAS, the applicant notes that in 1982, the surrounding area was economically depressed with no new development or economic investment in many years prior to the adoption of the Cooper Square URP in 1970; in fact, the URP was necessitated by the fact that the real estate in the area had no value sufficient to induce private investment and development; and

WHEREAS, the applicant asserts that as in 120 West 25th Street, "there was no demand for and therefore no value to the development rights appurtenant to any of the properties in the area;" and

WHEREAS, the applicant asserts that the grant of the height and setback waivers for the Existing Building put the site's owner on an equal footing with the owners of other properties in the surrounding area which do not have a subway tunnel running beneath them, creating practical difficulty and unnecessary hardship in constructing a concrete plank and bearing wall building; and

WHEREAS, the applicant asserts that the provision of height/setback waivers did not require that excess development rights, which had no value at the time, be stripped away while all the other properties in the area who similarly had valueless development rights in 1982 were able to retain their full development rights; and

WHEREAS, accordingly, the applicant asserts that because (1) 30 years have elapsed since the original variance grant and (2) the surrounding area was so economically depressed in 1982 that the unused development rights had no value and were unlikely to have been contemplated by the Board in granting the variance, development of the New Building using the unused development rights will not implicate or affect the basis of the Board's conclusion on the (b) finding; and

WHEREAS, the applicant asserts that, although the Board did not specifically address the compatibility of the proposed Existing Building with the surrounding area, it concluded that the height and setback would not alter the essential character of the neighborhood or impair the use or development of adjacent property by virtue of making all of the findings; and

WHEREAS, in support of the assertion that the area has changed a lot since the 1982 Approval, the applicant lists a number of developments in the area that have been constructed since 1982, including (1) a 14-story (130 feet) mixed-use building constructed in 2003 on a former Cooper Square URP site, which contains food store and 360 apartments, adjacent to the north of the site; (2) one block to the north, on another former Cooper Square Site, a nine-story (approximately

90 feet) mixed-use building with commercial use and 206 apartments constructed in 2005 and a seven-story mixed-use building with 90 apartments constructed in 2007; (3) a 12-sory (126 feet) building with 212 dormitory units for New York University at 1 East 2nd Street; (4) two 12-story (100 feet and 120 feet) and one ten-story (128 feet) mixed-use commercial residential buildings on East Houston Street within three blocks of the site; and (5) two blocks south of the site, a 16-story (160 feet) mixed-use building built in 2005; and

WHEREAS, the applicant provided the following information on hotels and buildings with heights in the 200-ft. range in the area: (1) the Bowery Hotel at 16 stories (190 feet) built in 2003; (2) the Standard Hotel with 21 stories (224 feet) built in 2006; (3) the Thompson LES Hotel at 20 stories (208 feet); (4) the Hotel on Rivington with 20 stories (194 feet); (5) 353 Bowery (24 stories (210 feet)); (6) 66 First Avenue (towers of 21 stories (197 feet) and 21 stories (195 feet)); (7) 40 First Avenue (21 stories (193 feet)); (8) 207 East Houston (23 stories (276 feet)); (9) 101 Ludlow (17 stories (230 feet)); and (9) 62 Essex Street (23 stories (229 feet)); and

WHEREAS, the applicant asserts that the neighborhood is now mixed-use with many new buildings of ten and 12 stories and some of 20 stories or more, in contrast to the area in 1982 when the neighborhood was characterized by four- to six-story older buildings; and

WHEREAS, as to the (d) finding, the applicant states that the practical difficulties and unnecessary hardship which led to the request for the variance still exist as do the HUD and Section 8 financing and building height requirements associated with the subsidized Existing Building, respectively; and

WHEREAS, the applicant asserts that none of the physical conditions or City policies were created by the owner or any predecessor in interest; and

WHEREAS, as to the (e) finding, the applicant notes that the 1982 Approval characterized the zoning waivers as allowing a "minor intrusion in the sky exposure plane" and the New Building does not require any new zoning relief; and

WHEREAS, the applicant cites to BSA Cal. No. 1149-62-BZ (Saint Francis Xavier/Clothing Workers Center) to support its position that an amendment to a prior variance like the proposed is appropriate when "the waivers and conditions of the underlying grant are not implicated" and "the configuration of the other buildings on the zoning lot will remain the same;" and

WHEREAS, the applicant enumerates the similarities with the Saint Francis Xavier case as follows (1) several decades have passed since the original variance grant; (2) the surrounding area was so economically depressed in 1982 that the unused development rights had no value and were unlikely to have been contemplated by the Board in granting the original variance; (3) no new variances and no changes to the original variance are required; and (4) except for the addition of the rooftop open space, the configuration of the Existing Building will remain the same; and

WHEREAS, the applicant asserts that it is not disturbing the prior approval by constructing the New Building in the open space because there is not any record that the Board intended to require the applicant to maintain the open space as a condition of the variance; in contrast, the applicant asserts that there was discussion about the parking spaces and the Board required that the applicant provide all of the required spaces, which it has and which will be maintained; and

WHEREAS, as to the open space, the applicant notes that the site currently has a total of 40,388 sq. ft. of open space, of which 7,677 sq. ft. is paved and used for the residential parking lot and driveway and 32,711 sq. ft. is unpaved and includes sidewalks, walking paths, play areas and lawn; and

WHEREAS, the applicant proposes 28,141 sq. ft. of open space at grade, of which 10,057 sq. ft. will be paved and used for the residential parking lot and driveway as well as the proposed hotel drop-off, and 18,084 sq. ft. would be landscaped; the remaining 6,339 sq. ft. of open space will be provided on several rooftops of the New Building; and

WHEREAS, the applicant states that the open spaces at the front of the Existing Building along Stanton Street and the corners of Bowery and Chrystie Street will not be reduced; and

WHEREAS, additionally, the applicant proposes to redevelop the roof of the Existing Building as residential open area and part of the program to upgrade and improve the Existing Building; and

WHEREAS, the applicant notes that the proposed rooftop open space cannot be counted towards the open space requirement of ZR § 23-142 because it is above a portion of the building that contains dwelling units, but it will nonetheless provide approximately 9,150 sq. ft. of open area for the residents of the Existing Building; and

WHEREAS, the applicant asserts that including the rooftop area, there will be 5,466 fewer sq. ft. of open space than currently, however the new open space will be significantly improved over the existing conditions; and

WHEREAS, the applicant also notes that the site is across the street from the nearly eight-acre Sara Delano Roosevelt Park which provides access to more open space; and

WHEREAS, based on review of the record, the Board concludes that the Existing Building neither requires new waivers to zoning, nor affects the original waivers (across the site), nor affects the required findings

made at the time of the original grant; and

WHEREAS, the Opposition asserts that whenever an agency takes a discretionary action, it must consider the environmental impacts of that action and that the only exceptions to such review are those where the action is minimal in its impacts; and

WHEREAS, the Opposition asserts that the modification of the 1982 Approval to allow construction on the zoning lot governed by the Board is a discretionary act of the Board and there is no basis for determining that this is a Type II action subject to exemption, but rather, given its size and scope, it should be classified as a Type I action subject to environmental review; and

WHEREAS, the Opposition also states that the modification does not substantially comply with the Board's previous approval and the findings under which the approval was made are negatively affected by such amendments; and

WHEREAS, the Opposition cites to several New York State cases which discuss the appropriateness of a Type II finding including Zutt v. State of New York, 949 N.Y.S.2d 402 (2d Dept. 2012); Town of Goshen v. Serdarevic, 793 N.Y.S. 485 (2005); and Williamsburg Around the Bridge Block Association v. Giuliani, 644 N.Y.S.2d 252 (1996); and

WHEREAS, the Opposition states that it is irrelevant that the project is as-of-right after the Board's approval since the Board's approval is required before commencing the so-called as-of-right construction; and

WHEREAS, in response to the Opposition's concerns, the applicant states that (1) the Board has the discretion, per its Rules of Practice and Procedure § 1-07.1(a)(1) to determine which amendments to variances granted under ZR § 72-21 may be filed on the SOC calendar and may allow applications to be heard there unless it determines that "the scope of the application is major," in which case, the Board "may request that a new application be filed on the BZ [zoning] calendar;" and

WHEREAS, in support of its assertion that the Board was within its authority to hear the application on the SOC calendar and not require an environmental review, the applicant cites to Fisher v. Board of Standards and Appeals, 71 A.D 3d 487 (1st Dept. 2010) and 873 N.Y.S.2d 511 (Sup. Ct. 2008) which is the case that arose from the Board's decision for Saint Francis Xavier/Clothing Workers Center; and

WHEREAS, the applicant notes that the matter in Fisher was an application for the enlargement of the zoning lot of a site subject to a Board variance; the court noted that "the configuration of the other buildings on the zoning lot will remain the same" and that the application which "did not seek a new zoning variance or a relaxation of the Zoning Resolution requirements" and, thus the approval constituted "a technical amendment to the originally approved site plan" See also East 91st Neighbors to Preserve Landmarks v. New York City Board of Standards and Appeals, 294 A.D.2d 126 (1st Dept 2002); and

WHEREAS, the applicant notes that the Board's instructions for SOC applications do not include the requirement for a CEQR application; and

WHEREAS, the applicant also cites to Incorporated Village of Atlantic Beach v. Gavalas, 81 N.Y.2d 322, 326 (1993), in which the Court of Appeals analyzed the question of whether an action is discretionary or ministerial as follows:

> The pivotal inquiry in such matter is whether the information that would be considered in an environmental review may form the basis for a decision whether or not to undertake or approve the action under consideration. If an agency has some discretion, but that discretion is circumscribed by a narrow set of criteria that do not bear any relationship to the environmental concerns that may be raised in an environmental review, the agency's decisions will not be considered 'actions' for purposes of SEQRA and CEQR; and

WHEREAS, the applicant asserts that as in Atlantic Beach, the preparation of an environmental assessment would be a "meaningless and futile act" because the Board could not properly deny the requested minor amendment "on the basis of SEQRA's broader environmental concerns;" and

WHEREAS, the applicant asserts that the limited question before the Board is whether the findings made in granting the 1982 Approval are implicated or affected by the requested minor amendment and is completely unrelated to, and could not be informed by the information provided by an environmental assessment; and

WHEREAS, the applicant responds to the Opposition's assertion that an item may only be included on an agency's supplemental list of Type II actions if such action does not have a significant adverse environmental impact based on the criteria in SEQRA 617.7(c), stating that minor amendments to previously granted variances are not exempt because they are a *supplemental* Type II action but because they are exempt as *per se* Type II actions under 617.7(c)(19) as "official acts of a ministerial nature involving no exercise of discretion;" and

WHEREAS, the applicant refutes the Opposition's assertion that the action is a Type I action because it is an Unlisted action which exceeds certain Type I thresholds and meets certain other criteria, because it asserts that a minor amendment of a previously granted variance is not an Unlisted action; and

WHEREAS, as to the concerns about the effect of the New Building on the Gallery and the adjacent park and gardens, the applicant asserts that (1) the New

Building was not included in the area downzonings and thus is not subject to the conditions of the downzoning, (2) a building even reduced to half the size of the New Building would have the same effect on the Gallery as the proposal, (3) the Gallery does not have a protected right to light and air beyond what the Zoning Resolution and other relevant statutes require, and (4) the New Building is not subject to environmental review and does not require a shadow study, but even so, there is already a shadow across the garden from the 229 Chrystie Street building; and

WHEREAS, the applicant notes that it reduced the height of the proposal from 330 feet, which was similarly permitted by the underlying zoning district regulations to 274 feet, which results in a height that is substantially lower than what is permitted as-of-right in the C6-1 zoning district; and

WHEREAS, the applicant states that development in full compliance with all applicable zoning requirements is presumed to be compatible with the neighborhood character and to have no significant adverse impacts on the environment and that is why such buildings do not require analysis under CEQR See Matter of Neville v. Koch, 79 N.Y.2d 416 (1992); the court in Neville stated that "so long as the proposed use is one of the 'Uses Permitted As of Right' in the City's Zoning Resolution, a developer who also satisfies the Building Code can simply file its architectural plans with the Department of Buildings and begin construction upon issuance of a building permit;" and

WHEREAS, the Board concludes that the application for the New Building was appropriately classified as a minor amendment and heard on the SOC calendar and that the question before it is limited to whether the amendment disturbs the findings and conditions of the original variance and that such approval is of a ministerial nature that does not require environmental review; and

WHEREAS, the Board agrees with the applicant that the question of whether the New Building is compatible with neighborhood character is limited to a determination of whether the (c) finding of the 1982 Approval would be disturbed; and

WHEREAS, the Board agrees that the New Building will cast a shadow, but that because the building is within the building envelope contemplated by zoning for the C6-1 zoning district, it is presumed to not have a significant adverse impact and is thus not subject to environmental review; and

WHEREAS, the Board notes that the original (c) finding analysis was reserved to whether the Existing Building and its encroachment into the sky exposure plane was compatible with the character of the neighborhood; the Board notes that the single non-complying height/setback is not related to, and thus is not affected by the construction of the New Building; and

WHEREAS, the Board agrees with the applicant that there is not any evidence that the open space on the Board-approved site plan was a condition of the initial approval or that a redesign of that space would be in conflict with the prior approval; and

WHEREAS, the Board does not find that the existing open space was a required condition for the height/setback waivers associated with the Existing Building; and

WHEREAS, further, the Board notes that the applicant proposes to provide open space in compliance with zoning district requirements; and

WHEREAS, the Board notes that in the context of an amendment to a variance, the trigger for environmental review is not the height of the building but whether the effect on the variance is major or minor; any new non-compliance with zoning would be considered major as that would require new discretionary relief, but a modification within the scope of the original grant would not; and

WHEREAS, the Board finds that an action such as the proposed that does not have any effect on, and is neutral to, zoning compliance is not considered major as opposed to a proposal which increases the degree of non-compliance or introduces new non-compliance; and

WHEREAS, the Board notes that there is no assertion that the New Building requires any zoning waivers or in any way impacts the intrusion into the sky exposure plane of the upper stories of the Existing Building; and

WHEREAS, the Board notes that in Fisher, the Appellate Division upheld the Board's determination that an amendment that did not include a new variance or undermine the prior findings was technical in nature and not subject to environmental review; and

WHEREAS, the Board finds notes that the Appellate Division found that environmental review was not required because (1) the modification did not change any condition of the original approval and (2) no new non-compliance was created; and

WHEREAS, the Board notes that the court referred to a zoning lot merger (and a proposal for a 20-story hotel building on the new merged lot) involving a variance site under the Board's jurisdiction as being an as-of-right amendment; and

WHEREAS, the Board finds the facts in Fisher to be similar to the subject case; and

WHEREAS, however, the Board notes that it may exercise its discretion and ask for environmental review of amendments to prior approvals if the basis of the analysis has changed in a way that would affect CEQR categories; and

WHEREAS, lastly, the Board notes that it does not find that the height/setback variance associated with the 1982 Approval extinguished all other rights on the zoning lot; and

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WHEREAS, based upon its review of the record, the Board finds that the proposed modification of the site plan is appropriate.

Therefore it is Resolved that the Board of Standards and Appeals reopens and amends the resolution, said resolution having been adopted on June 11, 1982, so that as amended this portion of the resolution shall read: "to permit the construction of the New Building on the site and to permit modifications to the BSA-approved site plan on condition that all site conditions will comply with drawings marked 'Received December 4, 2012'– (29) sheets; and on further condition:

THAT the New Building will conform to the BSA-approved plans;

THAT any changes to the bulk of the New Building are subject to review and approval;

THAT all conditions from the prior resolution not specifically waived by the Board will remain in effect;

THAT the Department of Buildings must ensure compliance with all 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." (DOB Application No. 121011396)

Adopted by the Board of Standards and Appeals, December 11, 2012.

A true copy of resolution adopted by the Board of Standards and Appeals, December 11, 2012.
Printed in Bulletin No. 51, Vol. 97.
Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.