

**CEQR#04-BSA-100M**

APPLICANT - Fischbein Badillo Wagner Harding, for Bond Street Garage I, LLC, owner; Tribeach Holdings, LLC, contract vendee.

SUBJECT - Application December 4, 1993 - under Z.R. §72-21 to permit the proposed mixed-use building, located in an M1-5B zoning district, which creates non-compliance with regards to residential and retail uses, also public parking and floor area, which is contrary to Z.R. §42-00, §42-14, §32-17 and §43-12.

PREMISES AFFECTED - 25 Bond Street, south side, 70' east of Lafayette Street, Block 529, Lot 21, Borough of Manhattan.

**COMMUNITY BOARD #2M**

**APPEARANCES -**

For Applicant: Howard Hornstein and Peter Geis.

**ACTION OF THE BOARD -** Application granted on condition.

**THE VOTE TO GRANT -**

Affirmative: Chair Srinivasan, Vice-Chair Babbar, Commissioner Caliendo, Commissioner Miele and Commissioner Chin.....5

Negative:.....0

**THE RESOLUTION -**

WHEREAS, the decision of the Borough Commissioner, originally dated November 5, 2003, and revised April 21, 2004, acting on Department of Buildings Application No. 103600499, reads:

- "1) The proposed residential use (Use Group 2) in an M1-5B zoning district is contrary to ZR 42-00, not permitted.
- 2) The proposed commercial use (Use Group 8) in an M1-5B zoning district is contrary to ZR 42-14(D)(2), not permitted.
- 3) The proposed public parking garage (Use Group 8) in an M1-5B zoning district is contrary to ZR 32-17(C), not permitted.
- 4) The proposed front setback is fifteen (15) feet and therefore contrary to ZR 43-43."; and

WHEREAS, a public hearing was held on this application on February 24, 2004 after due notice by publication in the City Record, with continued hearings on March 30, 2004 and April 20, 2004, and then to decision on June 8, 2004; 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, Commissioner Caliendo, Commissioner Miele, and Commissioner Chin; and

WHEREAS, Assemblymember Glick submitted a letter voicing concern about the originally filed version of the subject application, which requested a floor area waiver in addition to the use variance and other bulk variances; and

WHEREAS, Community Board 2, Manhattan, recommended approval of the residential use request and the public parking request, as well as the Use Group 6 on the ground floor, on condition that there be no restaurant, bar or nightclub, but opposed any floor area waiver; and

WHEREAS, the majority of the community-based opposition was to the originally filed version of the proposal; and

WHEREAS, this is an application under Z.R. §72-21 to permit the proposed erection of a 101 feet high, 8-story mixed-use building, Use Groups 2, 6 and 8, consisting of residential apartments, local retail usage, and a public parking garage, located in an M1-5B zoning district, which creates non-conformances with regard to the use and public parking regulations and non-compliance with regard to the applicable setback regulations, contrary to Z.R. §§42-00, 42-14, 32-17, and 43-43; and

WHEREAS, the subject premises: is a rectangular shaped parcel with 100 feet of frontage on the south side of Bond Street, with a depth of 114.5 feet, has a total lot area of approximately 11,416 square feet, and is currently occupied by a two-story, 30 feet high parking garage (Use Group 8), which is a lawful non-conforming use; and

WHEREAS, the proposed eight-story mixed use building will have 57,080 square feet of floor area, a Floor Area Ratio of 5.0, 23 dwelling units (with a minimum unit size of 1,200 sq. ft.), and 48 commercial parking spaces in a cellar parking garage, with Use Group 6 retail space to be located on the ground floor; and

WHEREAS, the front setback at the 7th floor is 15 feet (20 feet is required); and

WHEREAS, since initially submitted to the Board in December of 2003, the proposal has been amended twice, in response to Board and community objections to the proposed height and additional bulk; and

WHEREAS, the originally filed proposal was for a 10-story, 161' high building (including mechanicals), with 65,574 square feet of floor area, 26 dwelling units, and a 5.74 FAR; and

WHEREAS, the first amended proposal, submitted March 9, 2004, was for a 9-story, 128' high building (including mechanicals), with 57,080 square feet of floor area, and a 5.0 FAR; and

WHEREAS, throughout the public hearing process, the Board expressed reservations about the proposed height of the building, and urged the applicant to bring the height down to a level compatible with the surrounding built conditions; the applicant then made the second amended proposal, which is the final version of the application, approved herein; and

WHEREAS, the only variances required under the final version of the application are for the

residential use and public parking garage, commercial use of the first floor, and a setback waiver; and

WHEREAS, the applicant represents that the following are unique physical conditions, which create practical difficulties and unnecessary hardships in constructing the proposed building in conformity with underlying district regulations: (1) the site is occupied by an under-built, non-conforming garage structure that can not be readily converted or enlarged to support a conforming use, thus necessitating its demolition prior to any conforming development; and (2) the site is small and conforming ground-up construction would result in a building with an undesirable floor plate for modern manufacturing or office requirements in the area; and

WHEREAS, the applicant also states that the site incurs engineering difficulties and costs associated with the removal of the garage, due to the large steel members that must be removed; and

WHEREAS, opposition to the application, through various submissions, makes the following arguments concerning the finding set forth at Z.R. §72-21(a): 1) that any alleged inefficiency of the existing garage structure can not be the basis for the finding; 2) that the smallness of the lot is not a unique condition, but is in fact shared by other lots in the area; 3) that the existing garage structure is not in a dilapidated condition has profitably occupied the site for many years and therefore can not be characterized as obsolete; and 4) that because the garage is realizing a profit, no current hardship exists; and

WHEREAS, the Board notes that opposition's arguments mischaracterize the 'a' finding as presented by the applicant, in that it is not any alleged inefficiency of the garage structure that is the basis of the 'a' finding, but rather that it can not be converted to a conforming use except at a cost-prohibitive expense, due to its structural limitations; and

WHEREAS, the Board also notes that although there are other small sites in the area, uniqueness arises from the combination of the smallness of the site with the existing garage structure, and that this combination of unique factors leads to hardship in developing the site in conformity with the underlying district regulations; and

WHEREAS, based upon the above, the Board finds that the fact that the land is one of the few smaller parcels in the subject zoning district, occupied by a existing structure that may not be feasibly adapted to conforming uses to be a unique physical condition that creates practical difficulties and unnecessary hardships in developing the site in strict conformity with current applicable zoning regulations; and

WHEREAS, the applicant has submitted a feasibility study purporting to demonstrate that developing the entire premises with a conforming use

would not yield the owner a reasonable return, due to the unique physical condition inherent to the zoning lot; and

WHEREAS, the original feasibility study contained an analysis of a conforming commercial office development scenario, which showed that such a development would not realize a reasonable return, given the premium construction costs related to the unique features of the site and the estimated income from the development; and

WHEREAS, at the Board's request, the applicant's financial consultant contemplated a hotel scenario, and provided the Board with a reasonable explanation as to why such a scenario also was not feasible; and

WHEREAS, opposition claims that because a viable, legal non-conforming use (the garage) occupies the site, the finding set forth at Z.R. §72-21(b) is not met; and

WHEREAS, opposition also claims that the income assessment of the garage fails to take into account income from daily/transient parking; and

WHEREAS, the Board asked the applicant to address opposition's concerns; and

WHEREAS, the applicant submitted a supplemental memorandum from its financial expert, analyzing total garage income, including consideration of daily parking rates, based upon further study of parking lots in the area; and

WHEREAS, the estimated income from the existing parking garage was much higher than income from comparable parking lots; and

WHEREAS, the applicant, in a June 1, 2004 submission, reiterates that the total per-space income for the existing garage includes both transient and monthly parking fees; and

WHEREAS, the applicant concludes, and the Board agrees, that the existing parking garage does not generate a reasonable return due to its under-built status; and

WHEREAS, the Board notes that the 'b' finding requires a showing that because of the unique features of the site, there is no reasonable possibility that conforming development will bring a reasonable return, and emphasizes that the feasibility study constituted such a showing, notwithstanding the existence of a non-conforming use that generates some income; and

WHEREAS, the Board also notes that the applicant explored recouping the unused development income through a transfer of development rights, but concluded that there was no feasible opportunity to do so; and

WHEREAS, based upon its review of the record, the Board determines that because of the subject lot's unique physical conditions, there is no reasonable possibility that development of the site in strict compliance with zoning will provide a

reasonable return; and

WHEREAS, the applicant states that area surrounding the site contains a significant amount of residential units on the upper floors of many buildings; and

WHEREAS, the applicant further states that the proposed Use Group 6 retail space on the ground floor of the proposed building will be compatible with other similar ground floor uses in the surrounding area; and

WHEREAS, the applicant has agreed to prohibit use of the ground floor of the proposed development for eating and drinking establishments, in response to community-based concerns; and

WHEREAS, the Board asked the applicant to reduce the FAR and the height of the building to the levels of the current proposal, and the applicant did so; and

WHEREAS, opposition claims that the reduction in parking in the area due to the demolition of the garage is a detrimental effect that was not considered by the Board; and

WHEREAS, the Board notes that it asked the applicant to address this issue, and the applicant provided evidence that there was a sufficient amount of public parking spaces in the area to compensate for the loss of the spaces in the existing garage; and

WHEREAS, the Board notes that there are other mixed use and residential buildings in the immediate and surrounding area; and

WHEREAS, the Board, based upon its review of the record and its site visit, finds that the proposed use and bulk of the proposed building will be compatible with the built conditions and land uses in the surrounding area; and

WHEREAS, 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, opposition claims argues that the existing non-conforming garage is a self-created hardship; and

WHEREAS, the applicant notes, and the Board agrees, that the garage was legal when built, but was built under different regulations, and that its existence does not make it a self-created hardship; and

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

WHEREAS, after taking guidance from the Board as to the need to decrease the bulk and height from the initial proposal, the applicant has significantly reduced the scope of the proposal; and

WHEREAS, consequently, the Board finds that the current proposal is the minimum necessary to

afford the owner 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, opposition claims that the Board acted inappropriately in closing the hearing on April 20, 2004; and

WHEREAS, the Board notes that it conducted 3 hearings on the subject application, and received three separate submissions from opposition, including one submission received on May 25, 2004, which provided opposition ample time to summarize its position; and

WHEREAS, the Board also notes that no outstanding issues were presented at the April 24, 2004 hearing which required further oral testimony; instead a generous briefing schedule was set, which allowed opposition three weeks to respond to an applicant submission; and

WHEREAS, the Board carefully considered all of opposition's submissions and testimony, and often directed the applicant to respond to various oppositions contentions; and

WHEREAS, the New York City Department of Environmental Protection ("DEP") has reviewed the applicant's November 17, 2003 Environmental Assessment Statement, January 8, 2003 Phase I Environmental Site Assessment Report, and the Limited Phase II Investigation of the subsurface soils beneath the basement slab for the subject site, and has made the following recommendations in its March 12, 2004 letter to the BSA: If any underground storage tanks (USTs) or UST systems (Fill lines, vent pipes, etc.) are encountered during the proposed excavation activities, they should be properly removed/closed in accordance with all applicable federal, state, and local regulations; if applicable, a tank closure report) including affidavits, disposal manifest, post-excavation samples, etc.) should be submitted to the New York State Department of Environmental Conservation; Asbestos-containing material, lighting fixtures containing PCB components, and lead-based paint within the existing structure should be identified or tested and appropriate methods of abatement/management and disposal should be followed in accordance with all applicable federal, state, and local regulations; and

WHEREAS, the New York City Landmarks Preservation Commission ("LPC") has reviewed and approved of the applicant's Construction Protection Plan dated May 21, 2004; this document was requested by LPC to address any potential effects of the construction of the proposed project on adjacent properties in the potential NoHo 3 Historic District; and

WHEREAS, LPC has reviewed the revised

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proposed building elevations dated April 6, 2004 and finds them acceptable and has determined that they do not represent a significant impact; LPC requests that the applicant ensure that façade materials and colors shall be compatible with the late 19th Century and early 20th Century loft buildings within the potential NoHo 3 Historic District; and

WHEREAS, the Board has conducted an environmental review of the proposed action and the Environmental Assessment Statement and has carefully considered all relevant areas of environmental concern, including the proposal's impact on parking in the area; and

WHEREAS, the evidence demonstrates no foreseeable significant environmental impacts that would require the preparation of an Environmental Impact Statement.

Resolved, that the Board of Standards and Appeals issues a Negative Declaration with the conditions noted below under 6 NYCRR Part 617 and §6-07(b) of the Rules of Procedure for City Environmental Quality Review and makes each and every one of the required findings under Z.R. §72-21 and grants a variation in the application of the Zoning Resolution, limited to the objections cited, to permit the proposed erection of a 101 feet high, 8-story mixed-use building, Use Groups 2, 6 and 8, consisting of residential apartments and local retail usage, located in an M1-5B zoning district, which creates non-conformances with regard to the use and public parking regulations and non-compliances with regard to the setback regulations, contrary to Z.R. §§42-00, 42-14, 32-17, and 43-43; on condition that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "April 6, 2004"-(10) sheets and on further condition:

THAT the FAR of the building will be limited to 5.0, the height will be limited to 101 feet (not including mechanicals), and a complying rear yard will be provided;

THAT the ground floor commercial space will only be occupied by Use Group 6 retail uses, except that it will not be occupied by a bar, nightclub, or restaurant;

THAT the minimum unit size shall be 1,200 square feet; and

THAT the above conditions will appear on the certificate of occupancy;

**A true copy of resolution adopted by the Board of Standards and Appeals, June 8, 2004.**

**Printed in Bulletin Nos. 24-25, Vol. 89.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

THAT the applicant shall construct the proposed building in compliance with the LPC recommendations regarding façade materials and colors;

THAT based on DEP's recommendations, the applicant shall comply with the following items: (1) If any underground storage tanks (USTs) or UST systems (Fill lines, vent pipes, etc.) are encountered during the proposed excavation activities, they should be properly removed/closed in accordance with all applicable federal, state, and local regulations. If applicable, a tank closure report (including affidavits, disposal manifest, post-excavation samples, etc.) shall be submitted to the New York State Department of Environmental Conservation; and (2) Asbestos-containing material, lighting fixtures containing PCB components, and lead-based paint within the existing structure shall be identified or tested and appropriate methods of abatement / management and disposal should be followed in accordance with all applicable federal, state, and local regulations;

THAT the proposal shall comply with all applicable fire safety regulations;

THAT substantial construction will be completed in accordance with Z.R. §72-23;

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, June 8, 2004.