

74-07-BZ

APPLICANT – Fried, Frank, Harris, Shriver & Jacobson LLP, for Trustees of the Congregation Shearith Israel of the City of New York, owner.

SUBJECT – Application June 16, 2016 – Extension of Time to Complete Construction of a previously approved Variance (§72-21) permitting a nine (9) story residential/community facility building contrary to regulations for lot coverage (§24-11), rear yard (§24-36), base height, building height and setback (§23-633) and rear setback (§23-663) which expired on January 22, 2016; Amendment to the approved plans; Waiver of the Rules. R8B and R10A districts.

PREMISES AFFECTED – 6-10 West 70th Street, Block 1122, Lot(s) 36 & 37, Borough of Manhattan.

COMMUNITY BOARD #7M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Commissioner Ottley-Brown, Commissioner Montanez and Commissioner Chanda.....4

Negative:0

THE RESOLUTION –

WHEREAS, this is an application for a waiver of the Board’s Rules of Practice and Procedure (the “Rules”), an amendment to a variance, previously approved by the Board, and an extension of time to complete construction under the same, which expired on January 22, 2016; and

WHEREAS, a public hearing was held on October 14, 2016, after due notice by publication in *The City Record*, with continued hearing on January 10, 2017, and then to decision on February 28, 2017; and

WHEREAS, by resolution dated September 6, 2016, Community Board 7, Manhattan, recommends disapproval of certain of the proposed plan changes but approval of the request for an extension of time to complete construction; and

WHEREAS, by resolution dated December 6, 2016, Community Board 7, Manhattan reiterated its disapproval of the request to amend the variance on the basis that the findings justifying the grant of the previously approved variance, specifically financial hardship and the minimum variance, were no longer met due to the passage of time; and

WHEREAS, New York Assembly Member Richard Gottfried provided oral testimony on behalf of both himself and New York State Senator Brad Hoylman in opposition to this application on the basis that, *inter alia*, the proposed amendments are not minor and the proposal would negatively impact the Central Park West Historic District; Assembly Member Gottfried also expressed doubt that the proposed community facility will, indeed, contain classrooms; and

WHEREAS, the Board received additional testimony in opposition to the subject application, the specifics of which are addressed below; and

WHEREAS, this application is filed on behalf of the

Trustees of the Congregation Shearith Israel, a not-for-profit religious institution (the “Applicant” or “Congregation”); and

WHEREAS, Vice-Chair Hinkson, Commissioner Ottley-Brown, Commissioner Montanez and Commissioner Chanda performed inspections of the site and surrounding neighborhood; and

WHEREAS, Vice-Chair Hinkson recused herself from hearings and voting on the application; and

WHEREAS, the subject site is located on the southwestern corner of the intersection of West 70th Street and Central Park West, partially within an R8B zoning district and partially within an R10A zoning district, within the Upper West Side/Central Park West Historic District, in Manhattan; and

WHEREAS, the site has approximately 172 feet of frontage along West 70th Street, 100 feet of frontage along Central Park West, 17,272 square feet of lot area; Lot 37 is currently vacant and Lot 36 is occupied by the Congregation Shearith Israel synagogue building (the “Synagogue”), a landmark designated by the New York City Landmarks Preservation Commission (“LPC”), and a parsonage building; and

WHEREAS, the Board has exercised jurisdiction over the subject site since August 26, 2008, when, under the subject calendar number, the Board granted a variance, pursuant to ZR § 72-21, permitting the construction of a nine-story, plus cellar, mixed-use community facility and residential building that does not comply with applicable lot coverage, rear yard, base height, building height, front setback and rear setback regulations, contrary to ZR §§ 24-11, 77-24, 24-36, 23-66 and 23-633 (the “Proposed Building”); and

WHEREAS, the variance grant was conditioned, *inter alia*, on the Proposed Building having a total of 42,406 square feet of floor area, 20,054 square feet of floor area dedicated to community facility use, 22,352 square feet of floor area dedicated to residential use, a base height of 95’-1”, a front setback of 12’-0”, total height of 105’-10”, a rear yard of 20’-0”, a rear setback of 6’-8” and an interior lot coverage of 80 percent; and

WHEREAS, pursuant to the variance grant and ZR § 72-23, construction on the proposed building was required to have been substantially completed by August 26, 2012; and

WHEREAS, the Board’s resolution on the variance was issued on August 29, 2008; on September 29, 2008, proceedings were filed in New York State Supreme Court to annul the Board’s decision and such appeals were exhausted on February 21, 2012, when the New York State Court of Appeals’ decision to deny leave to appeal was entered and the decision of the New York Supreme Court Appellate Division, First Department, dated June 23, 2011, upholding the Board’s resolution, was therefore rendered final; and

WHEREAS, ZR § 72-23 provides that, where judicial proceedings have been instituted to review the Board’s decision to grant a variance, the four year period

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after which a variance grant will lapse will commence upon the date of entry of the final order in such proceedings, including appeals; and

WHEREAS, accordingly, the time by which substantial construction was to have been completed at the subject site pursuant to the variance was tolled from September 29, 2008 to February 21, 2012, and the time by which the Applicant was required to substantially complete construction expired on January 22, 2016; and

WHEREAS, construction at the site having not been substantially completed by that time, the Applicant now seeks a four (4) year extension of time; and

WHEREAS, to permit the filing of this application less than two years after the expiration of the time to complete construction, the Applicant requests a waiver, pursuant to § 1-14.2 of the Board's Rules, of Rule § 1-07.3(c)(2); and

WHEREAS, the Applicant represents that upon resolution of the judicial proceedings, they diligently retained consultants to assist in obtaining construction financing, obtaining extensions of necessary approvals and developing an approvable set of plans for the New York City Department of Buildings ("DOB"), but faced unanticipated setbacks beyond their control and did not obtain a building permit until August 2015; and

WHEREAS, in addition, the Applicant states that its loan documents were subject to approval by the New York State Attorney General (the "NYS AG") and New York State courts, a process that was not completed until March 2016; and

WHEREAS, the Applicant submits that, with permits and financing in hand, they are now prepared to proceed with the construction of the Proposed Building; and

WHEREAS, in addition to an extension to time to complete construction, the Applicant seeks an amendment to the variance to update the BSA-approved plans to show different interior partitions required in response to changes in the New York City Building Code and reflect the now finalized location of structural elements and mechanical equipment (the "2016 Plans"); and

WHEREAS, the Applicant states that the previously approved plans were filed prior to July 1, 2008, the date that the 2008 Building Code became effective, but that, because of the delay in construction caused by litigation, the Proposed Building must now comply with the 2008 Building Code; and

WHEREAS, specifically, the Applicant states that the change in the Building Code definition of "lot line" turned the tax lot boundary between Lots 36 and 37 into a "lot line" along which glass is to be fire-rated, but the incorporation of such glass into the previously approved plans would have caused the Proposed Building to project into Lot 36; because the New York City Department of Buildings ("DOB") would not permit a three-dimensional lot line, the Applicant opted to pull back the eastern wall of the seventh and eighth floors of the Proposed Building

in order to provide the required fire-rated separation and not intrude into Lot 36; and

WHEREAS, in addition, the 2008 Building Code no longer permits scissor stairs in the Proposed Building, thus the 2016 Plans replace the scissor stairs provided in the previously approved plans with separately enclosed egress stairs for the community facility use on the first through fourth floors and shift interior partitions in order to accommodate the larger footprint of these stairs; and

WHEREAS, the Applicant submits that the 2016 Plans differ from the previously approved plans in the following respects: the elimination of a proposed connection between the Synagogue and the Proposed Building; a reduction of 1,900 square feet of total floor area; a reduction of 1,697 square feet of community facility floor area; a reduction of 203 square feet of residential floor area; reductions in the FAR of the community facility portion of the building from 2.77 FAR to 2.67 FAR, in the residential portion of the building from 1.29 FAR to 1.28 FAR and in the total FAR of the building from 4.06 FAR to 3.95 FAR; a reduction in the base height of the building; a reduction in the total height of the building; the addition of three vent enclosures on the first floor roof; a lowering of the first floor roof in order to accommodate the new vent enclosures without increasing the height of the first floor; the provision of a larger mechanical rooftop bulkhead to accommodate the elevator overrun and an emergency generator; and the addition of louvers for air intake and exhaust on the rear façade of the fourth floor; and

WHEREAS, the Applicant represents that, consistent with the originally approved plans, the 2016 Plans propose six toddler classrooms with en-suite bathrooms on the second floor with only minor changes to the interior partitions and a slight reduction in their total capacity from 63 to 58 toddlers; six youth classrooms on the third floor and one shared youth and adult classroom on the fourth floor programming with only minor changes to the interior partitions that reduce the total capacity of the seven classrooms from 81 children and 102 adults to 76 children and 99 adults; and three adult classrooms on the fourth floor, including the one classroom shared with youth, with minor changes to interior partitions that reduce their total capacity from 55 adults to 52 adults; and

WHEREAS, the Applicant notes that they no longer seek to enlarge the small synagogue on the first floor of the Proposed Building, which they now intend to maintain at its current size and configuration and leaving its historic character intact, but argues that the elimination of this aspect of building programming has no impact on the programmatic needs previously presented by the Applicant to the Board in the original application for a variance and does not affect any of the space for which zoning waivers were ultimately granted; and

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WHEREAS, in response to Board questions about how the Applicant will compensate for the loss of space resulting from the elimination of the planned small synagogue expansion, the Applicant states that additional rows of chairs will be added to each section of the synagogue and larger services and events will be relocated to the main sanctuary and/or classrooms; and

WHEREAS, as for the residential floors of the Proposed Buildings, floors five through nine, the Applicant states that the only revisions contained in the 2016 Plans are an update to show the reconfiguration of stairs to meet the 2008 Building Code, the addition of separately enclosed egress stairs on the fifth floor and the addition of mechanical shafts; and

WHEREAS, finally, the Applicant notes that it submitted plans to DOB in August 2015 and to the Board in February 2016 (in connection with a request for a Letter of Substantial Compliance¹) that varied from both the previously approved plans and the 2016 Plans submitted herein in that they did not reflect the Applicant's program (the "Intermediary Plans"), but asserts that the Applicant and its consultants have since identified solutions to the design issues that led to creation of the Intermediary Plans and the 2016 Plans fully meet the Applicant's programmatic needs as presented in the original variance application; and

WHEREAS, in sum, the Applicant asserts that the requested amendment reflects the same program reviewed and approved by the Board in 2008, seeks no additional waivers, and the space subject to the waivers granted continue to be utilized for the programming identified in the variance, thus, the subject application constitutes a minor amendment that is has been properly filed on the Board's Special Order Calendar; and

WHEREAS, members of the community, some represented in blocs by counsel, testified at the hearing and provided testimony in opposition to the subject application (collectively, the "Opposition") contesting the Applicant's assertion that the subject amendment is minor and arguing that the subject application, particularly the 2016 Plans, evidence major changes to the Applicant's programming and, thus, constitute a major amendment that must be heard on the Board's Zoning Calendar with a re-consideration of the findings required for the variance pursuant to ZR § 72-21; and

WHEREAS, counsel for an owner of a townhouse located at 15 West 70th Street, across the street from the subject site ("Opposition Group 1"), raised concerns regarding the subject application including the following:

1 Pursuant to § 1-12.11 of the Board's rules, certain minor amendments of or corrections to previously approved plans may be approved by the Chair by Letter of Substantial Compliance, provided that the amendments or corrections substantially comply with the Board's previous approval. The Applicant's February 2016 request was denied by Board staff.

the Intermediary Plans, on which spaces previously labeled as "classrooms" were labeled as "offices," contradict the Applicant's purported programmatic needs and are evidence of the Applicant's true intentions of operating commercial enterprises on the site; the originally proposed classrooms were eliminated and replaced with offices on the Intermediary Plans once the Applicant's intended occupant of that space, a Jewish school, ended its lease of the space, demonstrating that classroom spaces were not the true motivator of the variance; the true driver of the variance is the Applicant's desire for a commercial banquet hall and wedding venue; the elimination of a proposed enlargement of the small synagogue demonstrates that the expansion is not, in fact, necessary and undermines the Applicant's assertion that such an enlargement was necessary for their programming; the Applicant's true intention is to construct the largest building with as many commercial components as possible; the Applicant intentionally concealed all drawings and documents relating to the Intermediary Plans and omitted these plans from the subject filing; the Applicant's inactivity with regards to pursuing construction on the site between May 2015 and January 2016 is to blame for the lapse of the variance; the Applicant should have known that the Proposed Building would have had to comply with the 2008 Building Code; the subject site can accommodate all of the Applicant's programmatic needs without the subject variance; and the financial analyses submitted to support the 2008 variance are outdated and no longer relevant; and

WHEREAS, in response to Board questions regarding the labeling of spaces on the Intermediary Plans, the Applicant stated that the word "office" was intended to refer to the size of the rooms (i.e. "office-sized") because they were smaller than conventional classrooms, rather than their use; in response to Board questions regarding utilization of the classroom space proposed on the 2016 Plans, the Applicant submitted a programmatic analysis of how the Applicant intends to utilize the community facility portion of the Proposed Building and the Board found such study to be acceptable; and

WHEREAS, otherwise, the Board dismisses a substantial number of the concerns raised by Opposition Group 1 as speculative, extraneous to the relief requested in this application and/or unsupported by the record; particularly, in response to the allegation that the Applicant "concealed," intentionally or otherwise, all drawings and documentation relating to the Intermediary Plans, the Board makes reference to Opposition Group 1's own filing, which, as it argues that the Intermediary Plans were "systematically conceal[ed]," contradictorily presents a timeline of the Applicant's publicly accessible filings of the Intermediary Plans with three New York City agencies, including the Board; in response to the allegation that the Applicant sat on its variance and did nothing to move forward with constructing the Proposed Building between May 2015 and the lapse of the variance,

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the Board points to statements made by the Applicant that the building formerly located on the subject site (the Community House) was demolished in or around May 2015 to make way for construction of the Proposed Building and that the Applicant corresponded with the NYS AG between December 2015 and March 2016 regarding the approval of loans for the project; and

WHEREAS, with regards to Opposition Group 1's concern about the age and irrelevance of the financial analyses provided in connection with the 2008 variance application, the Board notes that, as a not-for-profit, the Applicant was not required to demonstrate that a development in strict conformity with the zoning requirements would yield a reasonable return for the community-facility portion of the Proposed Building, where the majority of the revisions to the previously approved plans are herein proposed, and the previously submitted financial analyses were related only to the residential floors, the revisions to which, the Board finds, do not warrant or require revisions to the previously provided financial analyses; and

WHEREAS, Opposition Group 1 also alleged that the Applicant misrepresented their activity at DOB to the Board by failing to acknowledge any of the events subsequent to DOB's approval of the Applicant's New Building application on May 5, 2015, most notably: a Zoning Challenge and Appeal filed at DOB objecting to, *inter alia*, the repurposing of classrooms for offices and increased height of the building, as shown on the Intermediary Plans, dated June 10, 2015; DOB's acceptance of the zoning challenge, dated September 22, 2015; and DOB's letter indicating an intention to revoke the approval and permits and order to stop all work at the premises, dated March 30, 2016; and

WHEREAS, with regards to these allegations, the Board clarifies that DOB accepted two out of the four challenges raised by Opposition Group 1—that the interior layouts had been substantially changed through all floors of the building and that the altered location of the caretaker's apartment was not substantially consistent with the previously approved plans—yet stated that it was “unable to make a determination on the specific question of the validity of the BSA variance on the grounds that the underpinning for the ‘programmatic need’ argument has changed” and required the Applicant to return to the Board “for a modification of the previous approval, or other measure as deemed appropriate by the Board”; and

WHEREAS, in addition, the Board clarifies that the timeline provided by the Applicant, and identified by Opposition Group 1 as misleading by its omissions, was prepared to indicate the Applicant's efforts to substantially complete construction at the site and justify the request for an extension of time to complete construction; and

WHEREAS, Opposition Group 1 also questioned whether the 2008 variance was granted by the Board not solely to satisfy the applicant's programmatic needs, but to also allow the Applicants to make a reasonable return on

its investment in the subject property, and points to the Intermediary Plans as having undermined the Applicant's claims so much as to vacate the variance and require the Applicant to, once again, make all of the variance findings set forth in ZR § 72-21; and

WHEREAS, the West Side Neighbors Association, a coalition of individuals who live in close proximity to the subject site and represented by separate counsel (“Opposition Group 2”), additionally raised the following concerns in their filings with the Board on this application: the proposed modification are significant, not minor the proposed modifications undermine the financial analysis completed in connection with the 2008 variance application, requiring disapproval of the subject application or the submission of revised financial analyses; the significant amount of time since the 2008 variance grant and the improvements in the real estate market that have resulted in, among other things, the value of the Proposed Building having doubled since 2008 (based on a 2015 appraisal submitted by the Applicant to the New York State Supreme Court), warrant a reevaluation of the basis for the 2008 variance; and the addition of mechanical bulkheads without an adequate study of their adverse environmental impacts; and

WHEREAS, the Board finds with the characterization of the proposed modifications as significant or material with respect to the original variance granted to be contradicted by the evidence and notes that Opposition Group 2's list of modifications from the previously approved plans present on the 2016 Plans is somewhat misleading in that it includes the same alteration present on several floors (i.e. open stairs replaced with enclosed linear egress stairs and added perimeter columns) as discrete modifications; and

WHEREAS, the Board also distinguishes BSA Cal. No. 135-05-BZ (217 West 147th Street, Manhattan), a Board decision provided by Opposition Group 2 in advance of his argument that a revised financial analysis is required in connection with the subject variance amendment request because of the proposed plan changes, by the facts that, in that case, the proposed amendment included an additional waiver and increased the scope of a previously approved waiver, neither of which are requested in the subject application; and

WHEREAS, with regards to the 2015 appraisal, the Board notes that the appraisal's purpose is to present the market value of the project according to its highest and best use in order to justify the loan for which the Applicant seeks approval and such purpose is separate and distinct from the purpose of the financial analyses submitted to and reviewed by the Board in connection with applications for a variance, therefore, the appraisal is irrelevant to the subject application; and

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WHEREAS, as to Opposition Group 2's citation to the Resolution issued for BSA Cal. No. 299-82-BZ (207 Chrystie Street, Manhattan), which states that the amendment sought therein was minor because "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," the Board clarifies that those quotes were specifically identified in the Resolution as arguments made by the applicant in support of their position that the proposed amendment was appropriate, not a conclusion made by the Board; and

WHEREAS, Opposition Group 2 additionally cites Fisher v. Board of Standards and Appeals, 71 AD3d 487 (1st Dept 2010) aff'g 21 Misc3d 1134(A) (Sup Ct 2008), which held that an application to enlarge a zoning lot subject to a Board variance was a minor modification because it did not change any of the conditions of the prior variance pertinent to the waivers authorized by the variance and introduced no new non-compliances, to support his contention that the subject amendment is not minor; and

WHEREAS, the Board notes that its conclusion that the subject proposed amendment is minor is consistent with Fisher—the 2016 Plans constitute a minor amendment precisely because they do not change any of the conditions of the prior variance relevant to the waivers granted therein and do not request additional waivers; and

WHEREAS, the Board submits that, pursuant to § 1-07(a)(1), the determination of whether the scope of a requested amendment is minor is within its discretion, and if, upon further review of the application or during hearing, the Board determines that the request is, instead, major, the Board may request additional information, including financial analyses and the review of environmental impacts; and

WHEREAS, as previously stated, the Board finds that no additional financial analyses are required in connection with this application, but echoes Opposition Group 2's concern regarding the potential, and heretofore unanalyzed, impacts of the various rooftop mechanicals added to the 2016 Plans and, accordingly, asked for additional review and information regarding their potential impacts on neighboring properties; and

WHEREAS, in response, the Applicant provided additional noise studies demonstrating that during evening hours, the noise levels emanating from the subject site would be less perceptible than they are during daytime hours and that if all the proposed mechanical equipment, including the kitchen exhaust and HVAP equipment, was running at the same time during a period when the ambient noise level was low, the resulting noise level would range from nearly imperceptible to marginally noticeable; and

WHEREAS, the Applicant also proposed additional noise attenuation measures to ensure that noise levels are no greater than 2 dBA above ambient daytime hours and no greater than 1 dBA above ambient levels during

nighttime hours and incorporated those measures into the 2016 Plans; and

WHEREAS, counsel for Landmark West!, property owners and residents of the immediate vicinity of the subject site ("Opposition Group 3"), raised the following additional issues in opposition to this application: the Applicant's failure to submit the 2016 Plans to DOB for review prior to filing with the Board is an attempt to "skip the line" and "put the cart before the horse"; the Applicant failed to provide notice of this application to affected property owners in accordance with the Board's Rules; the subject application is untimely; the Applicant failed to provide the Board with its March 2016 application to the Charities Registration Bureau of the NYS AG's Office for approval of a mortgage loan, justifying denial of the application; and the Applicant failed to address the relocation of the caretaker's apartment from the third floor to the fourth floor, contrary to the executed restrictive covenant previously; and

WHEREAS, the Board addresses, and dismisses, each of Opposition Group 3's points as follows, in turn: it is not uncommon for sites under Board jurisdiction to seek Board approval of revised plans, whether by Letter of Substantial Compliance or a formal application, prior to submitting them to DOB; as previously stated, this application was filed on the Board's Special Order Calendar, the procedures for which are set forth in § 1-07 et seq., and do not require notice to affected property owners; the subject application was, in fact, filed after the Applicant's time to complete construction expired, but the Applicant requested a waiver of the Board's Rules regarding the timing of the application, as permitted by Rule § 1-14.2, as required; the Board fails to understand why the absence of the Applicant's mortgage loan to the NYS AG from the record requires denial of this application, which is for an extension of time, and clarifies that the record in this case does, in fact, reflect the Applicant's correspondence with the NYS AG with regards to the approval of financing relating to the Proposed Building; and the Applicant agreed to amend the restrictive covenant to the extent required by DOB to reflect the relocation of the caretaker's apartment to the fourth floor; and

WHEREAS, the Opposition has paid significant attention to the discrepancies between the Board's previously approved plans for this site and the Intermediary Plans submitted by the Applicant to DOB, but the Board notes that, for this application, the 2016 Plans, not the Intermediary Plans, which were disapproved and are not before this Board for its approval, are the relevant comparator to the previously approved plans, and the Board finds that, as compared to the previously approved plans, the alterations present in the 2016 Plans are, in fact, minor in nature; and

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Adopted by the Board of Standards and Appeals,
February 28, 2017.

WHEREAS, in sum, the Board finds that the Applicant has submitted sufficient evidence into the record regarding their actions, and the setbacks they experienced, from the time of the cessation of the litigation to the expiration of time to complete construction pursuant to the 2008 variance, as tolled by the same litigation, to warrant a grant of the requested extension of time to complete construction and that the requested amendment to the variance is appropriate with certain conditions, as set forth below.

Therefore it is Resolved, that the Board of Standards and Appeals *waives* the Rules of Practice and Procedures, *reopens* and *amends* the resolution, dated August 26, 2008, so that as amended this portion of the resolution reads: “to grant a four (4) year extension of time to complete construction to January 22, 2020; *on condition* that any and all work shall substantially conform to drawings filed with this application marked “Received November 16, 2016”—Four (4) sheets, “Received February 23, 2017”—One (1) sheet, “Received November 16, 2016”—Eight (8) sheets, “Received January 24, 2017”—Two (2) sheets, “Received February 23, 2017”—One (1) sheet, “Received November 16, 2016”—Three (3) sheets, for a total of nineteen (19) sheets; and *on further condition*:

THAT construction shall be completed within four (4) years, by January 22, 2020;

THAT the applicant shall obtain an updated Certificate of Appropriateness from the Landmarks Preservation Commission prior to any building permit being issued by the Department of Buildings;

THAT refuse generated by the Synagogue shall be stored in a refrigerated vault within the building, as shown on the BSA-approved plans;

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

THAT substantial construction be completed in accordance with ZR § 72-23;

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

THAT 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.”

A true copy of resolution adopted by the Board of Standards and Appeals, February 28, 2017.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

