80-07-BZ
APPLICANT – Sheldon Lobel, P.C., for Clover Housing Development Fund Corp., owner.
SUBJECT – Application April 12, 2007 – Variance (§72-21) to permit a nine-story and cellar not-for-profit institution with sleeping accommodations and accessory supportive social service space. The proposal is contrary to wall height, setback, and sky exposure plane (§24-522), rear yard (§24-36), and the permitted reconstruction to allow the construction of a nine-story community facility building (§54-41). R8 zoning district.
PREMISES AFFECTED – 319 West 94th Street, West 94th Street between Riverside Drive and West End Avenue. Block 1253, Lot 10, Borough of Manhattan.
COMMUNITY BOARD # 7M
APPEARANCES –
For Applicant: Richard Lobel.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson, Commissioner Montanez and…….....5
Negative:.....0
THE RESOLUTION:

WHEREAS, the decision of the Manhattan Borough Commissioner, dated March 26, 2007 acting on Department of Buildings Application No. 104694868 reads, in pertinent part:

> "Proposed wall height, setback & sky exposure are not permitted and are contrary to ZR 24-522.
> Proposed rear yard does not meet minimum requirement, is not permitted, and is contrary to ZR 24-36.
> Proposed demolition of existing building is not permitted and is contrary to ZR 54-41;" and

WHEREAS, this is an application under ZR § 72-21, to permit, within an R8 zoning district, the three story enlargement of an existing six-story building for a community facility with sleeping accommodations and accessory social service space that exceeds the street wall height, does not provide the required setbacks, encroaches into the setback and sky exposure plane, does not provide the required rear yard, and demolishes more than 75 percent of the interior floor area of an existing non-complying building, contrary to ZR §§ 24-522, 24-36, and 54-41; and

WHEREAS, after due notice by publication in *The City Record*, a public hearing was held on this application on August 21, 2007, with a continued hearing on September 25, 2007, and then to decision on October 23, 2007; and

WHEREAS, in connection with a proceeding pending in New York Supreme Court, County of New York (captioned Neighborhood in the Nineties, Inc. v. Board of Standards and Apps., Index No. 115705-2007), the applicant disclosed that it not have proof that proper notice had been performed, specifically, that residents of the subject building had been notified prior to the hearing; and

WHEREAS, therefore, in accordance with § 666(8) of the Charter and § 1-10(f) of its Rules of Practice and Procedure, the Board moved to review its October 23, 2007 decision; and

WHEREAS, a hearing in connection with the Board's review of this application was held on May 13, 2008, after due notice in *The City Record*, and then to decision on July 15, 2008; and

WHEREAS, accordingly, this resolution supersedes the resolution dated October 23, 2007; and

WHEREAS, the Board notes that the applicant provided documentation that the residents of the building and the affected property owners received proper notification of the re-hearing; the Board received 12 forms for objection and consent from affected property owners and 25 residents and property owners provided testimony at the re-hearing, as noted below; and

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

WHEREAS, Community Board 7, Manhattan, recommends approval of this application conditioned upon the following:

(1) that HPD and the applicant meet with a community advisory board regarding the safety of tenants during construction;
(2) that a memorandum of understanding be executed between the existing tenants and the applicant; and

WHEREAS, City Council Member Brewer testified at the initial set of hearings in favor of this application; and

WHEREAS, representatives of Neighborhood in the Nineties Block Association and other local residents testified in opposition to this application (the "Opposition"); and

WHEREAS, this application is brought on behalf of The Lantern Group, which is a not-for-profit affiliate of the Clover Housing Development Fund Corporation, a not-for-profit entity which owns the property; and

WHEREAS, the site's lot area is 7,565 sq. ft., with 75 feet of frontage on the northern side of West 94th Street, approximately 214 ft. east of Riverside Drive; and

WHEREAS, the site is currently improved upon with a dumbbell-shaped six-story non-complying New Law Tenement Class A Building, occupied as a Single Room Occupancy ("SRO"); and

WHEREAS, the building currently measures approximately 31,578 sq. ft. in floor area (FAR 4.17) and contains 149 rooming units, pursuant to a Certificate of Occupancy dated September 9, 1949, of

which 54 units are occupied; and

WHEREAS, the applicant proposes to rehabilitate and enlarge the existing structure for use as a 140-unit community facility with sleeping accommodations, with one unit for an on-site superintendent; and

WHEREAS, the proposed building will have a total floor area of 45,418 sq. ft. and a total FAR of 6.0, which are permitted as of right for a community facility use, and

WHEREAS, the proposed building will have a street wall height along West 94th Street of 88 feet (85 feet is the maximum permitted); with a setback of approximately 19'-6" (a 20'-0" foot setback is the minimum required); a total height of 99 feet (, and a rear yard of 13'-1" (30"-0" is the minimum required), and will require the substantial demolition of the existing building; and

WHEREAS, the applicant originally filed an application for a ten-story building which sought waivers to the floor area ratio (for a 6.70 FAR), floor area of 50,666 sq. ft., a street wall height of 109'-6", a total height of 109'-6", and 150 units, which was modified after discussions with community residents to the current proposal; and

ZR § 72-21 (a) – Unique Physical Conditions Finding

WHEREAS, under § 72-21 (a) of the Zoning Resolution, the Board must find that there are unique physical conditions inherent to the zoning lot which create practical difficulties or unnecessary hardship in strictly complying with the zoning requirements (the "(a) finding"); and

WHEREAS, the applicant represents that the variance request is necessitated in part by the programmatic needs and in part by the conditions on the subject site – namely -- the existing obsolete building, which will be retained; and

WHEREAS, as to the programmatic needs, the applicant represents that the community facility's proposed housing program, to be located on floors two through nine, will provide 52 studio apartments and 88 SRO units to meet the housing needs of (i) homeless single adults (40% of the units, approximately 56 units) and (ii) low-income adults currently living in the surrounding community (60% of the units, approximately 84 units); and

WHEREAS, the applicant states that the community facility's social service component, to be located on a portion of the cellar and ground floors, will include therapeutic, educational and employment services administered by a staff to include case managers, psychiatric social workers, an independent living skills specialist, a housing intake and outreach coordinator, vocational/educational counselor, nutritionist, program director and residence coordinators; and

WHEREAS, the applicant notes that the housing and social services program was designed in collaboration with New York City's Housing Development Corporation (HDC) and Department of Housing Preservation and Development (HPD), which are financing the development of the proposed community facility; and

WHEREAS, the applicant submitted a letter to the Board from HPD stating that the project funding was conditioned on providing a minimum of 140 dwelling/rooming units at the approved level of public subsidy, beyond which the project would be infeasible; and

WHEREAS, the applicant further notes that HPD and HDC program requirements also dictate the minimum unit sizes, the number of bathrooms and kitchenettes, and the volume of community space to be provided within the proposed building; and

WHEREAS, the applicant states that, in addition to creating 140 affordable units, its mission also includes preventing the displacement and relocation of the 52 current tenants, who are predominately elderly and low-income; and

WHEREAS, the applicant further states that it would be economically infeasible to relocate and rehouse the tenants during the construction of the facility; and

WHEREAS, the applicant represents that, as their relocation is neither financially feasible nor consistent with its mission, the existing tenants must be housed within the building while the proposed community facility is constructed; and

WHEREAS, the applicant asserts therefore, that (i) the existing building cannot be demolished and (ii) the number of dwelling units and the associated waivers requested are required to comply with funders' requirements; and

WHEREAS, the applicant states that the following unique physical conditions of the existing building create practical difficulties and unnecessary hardship in developing the subject site in compliance with underlying district regulations: (1) its dumbbell shaped floorplate, (2) the existing non-complying rear yard, and (3) the non-complying non-fireproof nature of the building; and

WHEREAS, as to the dumbbell-shaped footprint, the floorplate results in an irregular and inefficient floorplate with court yards of approximately 20 feet by 30 feet at the east and west;

WHEREAS, the applicant states that this irregular floorplate generates an excessive amount of hallway circulation space in comparison to the floorplate of a more typical square-shaped building; and

WHEREAS, the applicant notes that the inefficient floorplate results in an inability to use space that would otherwise have been available; and

WHEREAS, the applicant further notes that the inefficient floorplate constrains the programmatic space needs, which require the development of at least 140 studio apartments and SRO units and accessory social services space from being accommodated within the

existing structure; and

WHEREAS, notwithstanding the noted inefficiencies of the floorplate, the applicant states that it is compelled to retain the existing building in order to retain the existing tenants; and

WHEREAS, accordingly, the applicant proposes to enlarge the existing building; and

WHEREAS, the applicant further states that the cost to modify the building to conform to all relevant zoning regulations as well as to accommodate the programmatic space needs would far exceed its development budget, and require the relocation of the existing tenants; and

WHEREAS, the applicant has determined that accommodating its program needs within the building's footprint would require the construction of a vertical enlargement; and

WHEREAS, as to enlargement of the existing building, the applicant states that the existing court yards constrain the development of an as of right building that can accommodate its program needs; and

WHEREAS, the applicant further states that a complying development would require a front setback at the seventh floor and a thirty-foot rear yard for the enlarged portion of the building; and

WHEREAS, as to the existing rear yard, the applicant notes that the rear yard with a depth of 13'-1" is an existing non-complying condition and that the ground through sixth floors of the existing building encroach by 16'-11" into the rear yard; and

WHEREAS, the Opposition contends that the applicant has failed to establish that the building floorplate and rear yard constitute unique conditions; and

WHEREAS, the applicant submitted a survey of 48 neighboring residential properties located within a three-block radius of the subject site within the R8 zoning district indicating that only 16 buildings were characterized by dumbbell-shaped construction, of which only five also had rear yards of 13 ft. or less; and

WHEREAS, according to the survey, only one other site within the study area was owned by a not-for-profit organization, and that site was not burdened by a dumbbell-shaped configuration; and

WHEREAS, the Board notes that buildings characterized by rear yards and floorplates similar to that of the subject building constitute approximately ten percent of the buildings in the zoning district, but that no other building within the district is characterized by these burdens as well as by the programmatic needs of the subject building; and

WHEREAS, a finding of uniqueness, however, does not require that a given parcel be the only property so burdened by the condition(s) giving rise to the hardship, only that the condition is not so generally applicable as to dictate that the grant of a variance to all similarly situated properties would effect a material change in the district's zoning (see Douglaston Civ. Assn. v. Klein, 51 N.Y.2d 963, 965 (1980); and

WHEREAS, the applicant provided drawings showing an as of right 12-story structure with the required front setback and rear yard; and

WHEREAS, the applicant represents that the resulting building would have consequently smaller floorplates and would result in approximately 20 fewer units than are required to meet its programmatic needs; and

WHEREAS, as to the fire safety of the existing building, the applicant states that the building is a non-complying, non-fireproof Class 3 structure; and

WHEREAS, the applicant represents that the existing Building Code requires that a newly-constructed nine-story building be fireproof; and

WHEREAS, the applicant states that in order to create a fireproof structure that integrates the enlargement with the existing building, the replacement of the entire wood joist structural system, as well as antiquated plumbing, electrical, fire alarm and sprinkler systems and the installation of internal fire stairs and a code compliant elevator are required; and

WHEREAS, the applicant further states that the scope of this reconstruction necessitates the replacement of approximately 80 percent of the floor area of the existing building; and

WHEREAS, under ZR § 54- 41 no more than 75 percent of the floor area can be replaced in the reconstruction of an existing building; and

WHEREAS, at the hearing, the Board questioned whether the anticipated structural work required the replacement of more than 75 percent of the floor area of the existing wood joist structural system of the building with a new fireproof steel and concrete floor structure; and

WHEREAS, to respond to the Board's concern, the applicant sought a reconsideration from the Department of Buildings for the proposed replacement of 80 percent of the existing building; and

WHEREAS, in response, on September 10, 2007, the Deputy Borough Commissioner of the Buildings Department, denied a request for reconsideration, stating, "Proposed reconstruction exceeds permitted in ZR 54-41; 80% > 75%;" and

WHEREAS, the Board finds that replacement of more than 75 percent of the floor area is appropriate and necessary to improve the safety of the building; and

WHEREAS, the Opposition argues that uniqueness is limited to the physical conditions of the zoning lot and that obsolescence of a building therefore cannot fulfill the requirements of the (a) finding; and

WHEREAS, New York Courts have found that unique physical conditions under Section 72-21(a) of the Zoning Resolution refer not only to land, but to buildings as well (see Homes for the Homeless v. BSA, 7/23/2004, N.Y.L.J. citing UOB Realty (USA) Ltd. v.

Chin, 291 A.D.2d 248 (1st Dep't 2002;); and, further, obsolescence of a building is well-established as a basis for a finding of uniqueness (see Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985), and Polsinello v. Dwyer, 160 A.D. 2d 1056, 1058 (3d Dep't 1990) (condition creating hardship was land improved with a now-obsolete structure); and

WHEREAS, the applicant states that a waiver of street wall height, setback and sky exposure plane and rear yard requirements are necessary to develop the 140 units and social services space required to fulfill its programmatic mission; and

WHEREAS, the Opposition argues that the programmatic needs of a not-for-profit cannot support a uniqueness finding under section 72-21(a) of the Zoning Resolution; and

WHEREAS, however, in numerous prior instances the Board has found that unique physical conditions, when considered in the aggregate and in conjunction with the programmatic needs of a not-for-profit organization, can create practical difficulties and unnecessary hardship in developing a site in strict conformity with the current zoning (see, e.g., BSA Cal. No, 145-07-BZ, approving variance of lot coverage requirements to permit development of a medical facility; BSA Cal. No. 209-07-BZ, approving bulk variance to permit enlargement of a school for disabled children; and 215-07-BZ, approving bulk variance to permit enlargement of a YMCA); and

WHEREAS, further, under BSA Cal. No. 219-03-BZ, the Board approved the legalization of a transitional housing facility for homeless families sponsored by the not-for-profit organization Homes for the Homeless based on a finding that the programmatic needs of the organization, coupled with the physical conditions of the site created hardship; and

WHEREAS, BSA Cal. No. 219-03-BZ is the companion resolution to BSA Cal. No. 220-03-BZ, reviewed by the N.Y. County Supreme Court in Homes for the Homeless, 231 N.Y.L.J. 18 at 3, col. 3 (Sup. Ct. 2004) (N.Y. County), a case in which the proposed variance permitting expansion of an existing facility was rejected by the Board because the applicant had failed to adequately establish its programmatic need for the proposed expansion, not, as contended by the Opposition, because the Board could not consider programmatic need when making the (a) finding under ZR § 72-21; and

WHEREAS, the Board agrees that the unique physical conditions cited above, when considered in the aggregate and in light of the Lantern Group's programmatic needs, create practical difficulties and unnecessary hardship in developing the site in strict compliance with the applicable zoning regulations; thereby meeting the required finding under ZR § 72-21(a); and

ZR § 72-21 (b) – Financial Return Finding

WHEREAS, under ZR § 72-21 (b), the Board must establish that the physical conditions of the site preclude any reasonable possibility that its development in strict conformity with the zoning requirements will yield a reasonable return, and that the grant of a variance is therefore necessary to realize a reasonable return (the "(b) finding"), unless the applicant is a nonprofit organization, in which case the (b) finding is not required for the granting of a variance; and

WHEREAS, the applicant represents that it need not address the (b) finding since it is a not-for-profit organization and the development will be in furtherance of its not-for-profit mission; and

WHEREAS, the Opposition argues that the applicant must establish the (b) finding because it has purportedly been stripped of its status as a not-for-profit organization; and

WHEREAS, as evidence of its current status as a not-for-profit tax-exempt organization, the applicant supplied: (i) a certified copy of its Certificate of Incorporation pursuant to Article XI of the Private Housing Finance Law and Section 402 of the Not-For-Profit Corporation Law of the State of New York, dated November 19, 1998; (ii) a Certificate of Good Standing executed by the Special Deputy Secretary of State of the State of New York on May 19, 2008; (iii) a report of the Charities Bureau Registry Search of the Office of the New York State Attorney General printed June 18, 2008 indicating that the applicant's annual filing required for all charitable organizations was made April, 28, 2008; (iv) a Letter of Exemption under Section 501(c)(3) of the Internal Revenue Code; as well as (v) an Exempt Organization Certificate issued by the New York State Department of Taxation and Finance, all issued to the Clover Housing Development Fund Corporation; and

WHEREAS, the Board notes that the New York State Secretary of State oversees the formation and status of not-for-profit corporations and the New York State Attorney General oversees the regulation and enforcement of such organizations (see "The Regulatory Role of the New York State Attorney General," available from http://www.oag.state.ny.us/charities/role.pdf); and

WHEREAS, the existence of a current Certificate of Good Standing issued by the NY Secretary of State is dispositive of the question of the status of a not-for-profit organization; and

WHEREAS, the Opposition has submitted no documents originating from either the NY Secretary of State or the NY Attorney General invalidating the May 19, 2008 Certificate of Good Standing; and

WHEREAS, the documents submitted by the Opposition that purport to prove that the applicant has lost its not-for-profit status -- Internal Revenue Bulletin 2004-11 dated March 15, 2004 ("Bulletin 2004-11"),

and Internal Revenue Bulletin 2005-27 dated July 5, 2005 ("Bulletin 2005-27") (collectively, the "IRS Bulletins)" -- are entirely irrelevant to the question of the applicant's standing as a not-for-profit corporation; and

WHEREAS, instead, each IRS Bulletin lists several hundred organizations that, as of the date of issuance, are said to be classified as operating foundations, rather than public charities (both classifications are constituted as not-for-profit organizations); the name of the applicant is contained in Bulletin 2004-11, but is not identified by Bulletin 2005-271; and

WHEREAS, in addition to being irrelevant to the applicant's not-for-profit status, neither IRS Bulletin is relevant to the question of whether the applicant is a tax-exempt organization under section 501(c)(3) of the Internal Revenue Code, as the first page of each includes a disclaimer stating specifically that, "[t]his listing does *not* indicate that the organizations have lost their status as organizations under section 501(c)(3), eligible to receive deductible contributions" (emphasis in original); and

WHEREAS, the Board therefore finds that the applicant need not address ZR § 72-21(b) since it is a not-for-profit organization and the development will be in furtherance of its not-for-profit mission; and

ZR § 72-21 (c) – Neighborhood Character Finding

WHEREAS, as pertains to the (c) finding under ZR § 72-21, the Board is required to find that the grant of the variance will not alter the essential neighborhood character, impair the use or development of adjacent property, or be detrimental to the public welfare; and

WHEREAS, the applicant represents that the proposed variance will not negatively affect the character of the neighborhood, nor impact adjacent uses; and

WHEREAS, the applicant states that the proposed use, floor area and total height are permitted as of right under the zoning regulations and that the number of proposed units is fewer than the number permitted under the existing certificate occupancy, and

WHEREAS, the applicant states that the proposed street wall waiver would allow the building to rise to the eighth floor, to a height of 88 feet high along the West 94th Street street line; and

WHEREAS, the applicant notes that the zoning regulations permit a street wall height of 85 feet, and that the wall height increase is three feet over what is permitted and is compatible with neighborhood character; and

WHEREAS, the applicant represents that a complying development would be forced to set back from the street line at the eighth floor; and

WHEREAS, the applicant states that the building's eighth story will be recessed with a mansard and a series of dormer elements and suggests that these design elements mitigate the building height by providing a visual break and making the building appear to be only eight stories; and

WHEREAS, the applicant represents that the setback and rear yard waivers are required because the enlargement would rise upward and extend from the existing front and rear walls; and

WHEREAS, the Board agrees that the encroachment into the required rear yard is compensated by the gain in light and air as a result of the reduced height of the building; and

WHEREAS, the Opposition raised issues at hearing concerning the scale of the proposed building and its compatibility to the neighborhood context; and

WHEREAS, the applicant states that the proposed bulk and height of the building will not be out of context with surrounding buildings, pointing out that the subject site is flanked by six and seven-story multiple dwelling buildings and that a 21-story residential building is located approximately 75 feet from the site on the northeast corner of 94th Street and Riverside Drive, and a 16-story residential building is located directly to its south; and

WHEREAS, the applicant provided information in the record depicting an as of right enlargement which rises to 128 feet or 12 stories, containing the same square footage as the proposed development, but which included only 122 dwelling/rooming units instead of the 140 units which would be created by the proposed project; and

WHEREAS, the applicant represents that a complying development would be forced to set back from the street line at the eighth floor, as well as set back from the rear by 30 feet from the seventh floor; and that these setbacks in bulk would necessarily result in a twelve-story building, three stories higher than that proposed; and

WHEREAS, the Board notes that a building constructed as of right under the zoning regulations could be considerably taller than that proposed; and

WHEREAS, as noted above, the use is allowed as of right and the proposed variance seeks only a waiver of street wall height, setback, sky exposure plane and rear yard requirements of the zoning regulations; and

WHEREAS, the applicant represents that the target population to be served by a community facility would be immaterial to the consideration of the impacts on neighborhood character implicated by the grant of a waiver of street wall height, setback, sky exposure plane and rear yard requirements of the zoning regulations under ZR § 72-21; and

WHEREAS, the Opposition contends that the Board must consider the impact of the proposed residents on the surrounding residential community,

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1 Bulletin 2005-27 identifies an unrelated South Carolina organization, Clover Housing and Redevelopment Services, which the Opposition may have confused with the applicant.

based on its interpretation of the holding in Charisma Holding Corp. v. Zoning Bd. of Appeals; 266 A.D.2d 540 (2d Dep't 1999); and

WHEREAS, in Charisma, the Second Department upheld a zoning board's approval of a bulk variance permitting the expansion of an as of right auto repair and spray-painting business in a commercial district, but required the proposed building to be sited in an alternative location of the zoning lot to mitigate its impact on an adjacent residential district (the applicant had originally sought a location within 100 feet of a kitchen in a private home); and

WHEREAS, Charisma stands for the proposition that a zoning board can impose reasonable conditions to minimize the impact of a bulk variance for an as of right use; and

WHEREAS, consistent with Charisma, the Board evaluated the impacts of the variance on the potential light and air of surrounding buildings and on surrounding uses; and

WHEREAS, the Board finds no support within Charisma for the proposition that a zoning board must assess the purported impacts of new residents to a residential neighborhood in connection with a variance application which seeks only bulk waivers and further notes that the Opposition's submissions are bare of any legal authority for such a contention; and

WHEREAS, the applicant argues that the building will alter the "uniform character" of the neighborhood because it will be nine stories, rather the six or seven stories of the buildings on either side; and

WHEREAS, the Board notes that, at nine stories in height, the building would not be significantly taller than the adjacent seven-story buildings while remaining much shorter than the 15 to 21 story buildings located within 400 feet of the site; and

WHEREAS, based upon the above, the Board finds that this action will not alter the essential character of the surrounding neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

ZR § 72-21 (d) - Self Created Hardship Finding

WHEREAS, as pertains to the (d) finding under ZR § 72-21, the Board is required to find that the practical difficulties or unnecessary hardship burdening the site have not been created by the owner or by a predecessor in title; the purchase of a zoning lot subject to the cited hardship shall not constitute a self-created hardship; and

WHEREAS, the applicant states that the unnecessary hardship encountered by compliance with the zoning regulations is inherent to the site's unique physical conditions: (1) its dumbbell shaped floorplate, (2) the existing non-complying rear yard, and (3) the non-complying non-fireproof nature of the building; and

WHEREAS, the applicant further states that these conditions originate with its 1910 construction, long predating its acquisition of the building; and

WHEREAS, the Opposition contends that the applicant's hardship is instead created by its purchase of the subject building for which extensive renovations would be necessary to meet its programmatic needs; and

WHEREAS, as noted above, the purchase of a zoning lot subject to the restriction sought be varied is specifically not a self-created hardship under ZR § 72-21(d); furthermore, New York courts have consistently held that the purchase of land burdened by obsolete improvements is not a self-created hardship (see Citizens Sav. Bank v. Bd. of Zoning Apps., 238 A.D. 2d 874 (3d Dep't 1997); see generally, Fiore v. Zoning Bd. of Apps. of Town of Southeast, 21 N.Y. 2d 393 (1968); Matter of Commco, Inc. v. Amelkin, 109 A.D.2d 794, 796 (2d Dep't 1985), and Polsinello v. Dwyer, 160 A.D. 2d 1056, 1058 (3d Dep't 1990)

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

ZR § 72-21 (e) – Minimum Variance Finding

WHEREAS, as pertains to the (d) finding under ZR § 72-21, the Board is required to find that the variance sought is the minimum necessary to afford relief; and

WHEREAS, the Board notes that the applicant originally filed an application for a ten-story building which sought waivers to the floor area ratio (for a 6.70 FAR), floor area of 50,666 sq. ft., a street wall height of 109'-6", a total height of 109'-6", and 150 units, and

WHEREAS, in response to concerns raised by the Community Board and others, the applicant withdrew the floor area variance request and amended its proposal to instead seek to construct the building currently proposed with an FAR of 6.0, floor area of 45,418 sq. ft., a street wall height of 88'-0", a total height of 99'-0" and 140 units; and

WHEREAS, the Board finds that the requested wall height, sky exposure plane, setback, rear yard, and floor area demolition waivers are the minimum necessary to allow the applicant to fulfill its programmatic needs; and

WHEREAS, thus, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 72-21; and

Adequacy of Notice

WHEREAS, in an Article 78 action challenging the Board's October 23, 2007 approval of a variance permitting the facility, the Opposition asserted inter alia that the residents of the subject building had failed to receive notice of the proposed action and the public hearing, as required by the BSA Rules; and

WHEREAS, the Board agreed to reopen the hearing to provide an opportunity for residents of the building and of the neighborhood surrounding the proposed project to testify; and

WHEREAS, the applicant provided proof that letters of notification of the May 13, 2008 hearing, including descriptions of the proposed action, were

provided to residents in conformance with BSA notification procedures; and

WHEREAS, the Opposition contends that that notice of the May 13, 2008 hearing was difficult to understand by the average layperson and, therefore, that the hearing notice was inadequate; and

WHEREAS, in a submission to the Board, the applicant points out that the first sentence of the hearing notice states clearly, "[f]or a variation from the requirements of the Zoning Resolution so as to permit a nine-story and cellar not-for-profit institution with sleeping accommodations and accessory supportive social service space"; and

WHEREAS, the applicant further states that the standard by which courts determine adequacy of a hearing notice is whether the notice in question is: (i) misleading or deceptive; and (ii) whether neighboring property owners attended the public hearings (see Brew v. Hess, 124 A.D.2d 962, 963) (3d Dep't 1986) (citing Reizel, Inc. v. Exxon Corp., 42 A.D. 2d 500, 504 (2d Dep't 1973), aff'd 36 N.Y.2d 888 (1975); and

WHEREAS, as 25 witnesses testified at the May 13, 2008 hearing, in addition to the 14 persons who testified at the hearings held August 21, 2007 and September 25, 2007, the Board finds that the notice was effective at apprising neighborhood residents of the pendency of the action and afforded them an opportunity to be heard; and

Fair Share Analysis

WHEREAS, the Opposition also argues that the proposed project is a "city facility" and is thus subject to analysis under the "fair share" criteria for such facilities, in conformity with section 203 of the City Charter; and

WHEREAS, with respect to the application of fair share planning guidelines to the proposed building, the Board notes that section 203 of the Charter requires the Mayor to annually file with the City Planning Commission proposed criteria for the siting of new City facilities ("fair share criteria"); and

WHEREAS, a facility is defined by section 203 to be a city facility only if it "used or occupied . . . to meet city needs [and] is located on real property owned or leased by the city or is operated by the city or pursuant to a written agreement on behalf of the city"; and

WHEREAS, the fair share criteria are only considered when a city agency is selecting a site for a public facility (see NYC Charter, section 204(g)), and does not apply to a private entity, such as the applicant, that is developing an as of right use of a private property; and

WHEREAS, in cases with similar facts, the courts have found that not-for-profit sponsoring organizations were not subject to fair share analysis (see West 97th Street – West 98th Street Block Association v. Volunteers of America, 190 A.D.2d 303 (1st Dep't 1993) (fair share analysis not necessary for supportive housing project for persons with mental health problems or HIV) and Planning Board No. 4 v. Homes for the Homeless, 158 Misc.2d 184 (Sup. Ct. NY Co. 1993) (no violation of fair share criteria where project was financed and planned by HPD because facility would be operated by a not-for-profit organization and was therefore not a "city facility"); and

WHEREAS, the Opposition has provided no evidence that this project qualifies as a project subject to fair share analysis, furthermore, Board approval would not necessarily override subsequent review by other City agencies; and

WHEREAS, the Board therefore finds that the application of fair share planning principles to the proposed project is not properly before it; and

Application of ULURP

WHEREAS, the Opposition also argues that the proposed project constitutes a "site selection for a capital project" and a "housing project" within the meaning of section 197-c of the City Charter which requires full review under the City's Uniform Land Use Review Procedure ("ULURP"); and

WHEREAS, the Opposition has provided no evidence that this project qualifies for ULURP; and

WHEREAS, the Board therefore finds that the issue of ULURP is not properly before it; and

Adequacy of Environmental Review

WHEREAS, the project is classified as an unlisted action pursuant to Section 617.13 of 6 NYCRR; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 07BSA075M, dated April 10, 2007; and

WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Waterfront Revitalization Program; Infrastructure; Hazardous Materials; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; and Public Health, and that no other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable; and

WHEREAS, the Opposition disputes the EAS's findings and contends that the project would have significant adverse impacts on Socioeconomic Conditions; Shadows; Neighborhood Character; Hazardous Materials; Air Quality; Noise; and Public Health, and that the applicant is therefore required by the State Environmental Quality Review Act ("SEQRA") to prepare an environmental impact statement (an "EIS"); and

WHEREAS, with respect to socioeconomic conditions, the Opposition argues that preparation of an EIS was required to evaluate the alleged social and economic impacts of the building's potential occupancy; and

WHEREAS, neither SEQRA nor CEQR require an assessment of social impacts if an action does not change the use or intensity of a use or structure, and

WHEREAS, the proposed project would create no socioeconomic changes as it would merely continue, and actually reduce, an existing use; and the subject property has been operating under a certificate of occupancy as an SRO for at least 40 years, with a permitted occupancy of 149 units and the proposed project will develop only 140 dwelling units, a reduction in the permitted number; and

WHEREAS, based on the technical guidelines for CEQR, the proposed project, which entails a reduction to 141 units from the 149 units permitted by the certificate of occupancy, does not trigger the additional analysis of the impacts of the community facility on socioeconomic conditions or neighborhood character that the Opposition argues is required; and

WHEREAS, furthermore, an assessment of social impacts is triggered by a population increase in excess of 200 persons, but not by the type of persons who are proposed to occupy a building (CEQR Technical Manual at 3B-2); and

WHEREAS, the Opposition also asserts that the proposal would cast shadows across nearby playgrounds and other properties, that the height of the building is inconsistent with neighborhood character, and that the encroachment into the rear yard would significantly reduce light and air to neighboring structures ; and

WHEREAS, the applicant states that the CEQR regulations provide that an adverse shadow impact is considered to occur when the shadow from a proposed project falls upon a publicly accessible open space, a historic landscape, or other historic resource, if the features that make the resource significant depend on sunlight, or if the shadow falls on an important natural feature and adversely affects its uses or threatens the survival of important vegetation, and that shadows on streets and sidewalks or on other buildings are not considered significant under CEQR; and

WHEREAS, the applicant further states that the EAS analyzed the potential shadow impacts on publicly accessible open space and historic resources and found that no significant impacts would occur; and

WHEREAS, the applicant represents that the elevation of the building relative to other mid-block buildings does not constitute an adverse environmental impact under CEQR and further notes that at nine stories in height, the building would be modestly taller than the adjacent seven-story buildings while remaining much shorter than the 15 to 21 story buildings located within 400 feet of the site; and

WHEREAS, regarding the impacts to light and air to surrounding buildings caused by the increased non-compliance of the rear yard, the applicant notes that as of right construction of a 12-story structure would have more significant impacts on light and air than the proposed building; and

WHEREAS, with respect to hazardous materials and noise impacts, the Opposition argues that demolition of the building during construction would expose existing residents to lead paint, asbestos, toxic mold and bacteria and to excessive and prolonged noise impacts; and

WHEREAS, the applicant states that the EAS detected lead-based paints and asbestos-containing materials and these materials will be removed prior to and during construction in accordance with all applicable federal, State and City regulations; and

WHEREAS, the applicant further states that the based on the CEQR Manual, the project's construction impacts would likely be considered as temporary short-term impacts, as the development is not a large-scale action with a long construction period; further noise is not expected to be significant as construction vehicles and equipment would adhere to local and federal requirements for noise emission control; and

WHEREAS, with respect to public health impacts, the Opposition argues that demolition during construction would release rodents and other vermin into the surrounding neighborhood; and

WHEREAS, the applicant states that the CEQR Manual requires an assessment of a project only if it would attract vermin, which the proposed project does not, and that standard pest control procedures will be employed during construction; and

WHEREAS, the applicant states that the EAS was prepared in accordance with the NYC CEQR Manual; and

WHEREAS, the EAS prepared for the subject action indicated that the project would fall below the initial thresholds for each of the 20 environmental impact categories and that no significant impact would occur for each technical area; and

WHEREAS, the applicant states that no EIS would be needed if screening or detailed analyses show that no significant impact would occur; and

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment and therefore, that an EIS is not required; and

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and

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Executive Order No. 91 of 1977, as amended, and makes the required findings under ZR § 72-21, to permit, within an R8 zoning district, the three-story enlargement of an existing six-story building for a community facility with sleeping accommodations and accessory social service space that exceeds the street wall height, does not provide the required setbacks, encroaches into the sky exposure plane, does not provide the required rear yard, and demolishes more than 75 percent of the interior floor area of an existing building, contrary to ZR §§ 24-522, 24-36, and 54-41; *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 "Received July 17, 2007"–(12) sheets; and *on further condition*:

THAT the parameters of the proposed building shall be as follows: a community facility floor area of 45,418 sq. ft.; a total of 141 dwelling units; a total FAR of 6.0, a street wall height of 88 feet without a setback, a total height of 99 feet, and a rear yard of 13'-1";

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;

THAT lead-based paints and asbestos-containing materials be removed prior to and during construction in accordance with all applicable federal, State and City regulations;

THAT construction vehicles and equipment adhere to local and federal requirements for noise emission control;

THAT standard pest control procedures will be employed during construction; 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)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, July 15, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, July 15, 2008.
Printed in Bulletin No. 29, Vol. 93.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.