

**101-10-BZ
CEQR #10-BSA-076M**

APPLICANT – Sheldon Lobel, P.C., for Crosby 54 LLC, owners.

SUBJECT – Application June 4, 2010 – Variance (§72-21) to allow a commercial use below the floor level of the second story, contrary to use (§42-14(D)(2)(b)). M1-5B zoning district.

PREMISES AFFECTED – 54 Crosby Street, west side of Crosby Street between Broome and Spring Streets, Block 483, Lot 29, Borough of Manhattan.

COMMUNITY BOARD #2M

APPEARANCES –

For Applicant: Jordan Most.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated May 6, 2010, acting on Department of Buildings Application No. 120319413, reads in pertinent part:

“ZR 42-14 – In building in an M1-5B zoning district only uses 7, 9, 11, 16, 17A, 17B, 17C and 17E are allowed below the level of the second story unless modified by CPC.

Therefore a Use Group 6 eating and drinking establishment is not allowed “as-of-right” on the sub-cellar/cellar/and ground floor levels in a M1-5B zoning district”; and

WHEREAS, this is an application under ZR § 72-21, to permit within an M1-5B zoning district within the SoHo Cast Iron Historic District, the conversion of an existing two-story building to a Use Group 6 use (including eating and drinking establishment) use, contrary to ZR § 42-14; and

WHEREAS, a public hearing was held on this application on September 14, 2010, after due notice by publication in the *City Record*, with continued hearings on October 26, 2010 and December 14, 2010, and then to decision on February 15, 2011; and

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

WHEREAS, Community Board 2, Manhattan, does not support the application unless eating and drinking establishments are prohibited and the exterior spaces are prohibited from being used; and

WHEREAS, City Council Member Margaret Chin provided testimony in opposition to an eating and drinking establishment; and

WHEREAS, the residents of the condominium building to the north of the site at 56 Crosby Street, represented by counsel, (the “Opposition”) provided

written and oral testimony in opposition to the application; and

WHEREAS, specifically, the Opposition raises the following primary concerns: (1) there are not unique conditions on the site, which create a hardship, as required by ZR § 72-21(a); (2) a conforming use would provide a reasonable return, contrary to ZR § 72-21(b); (3) an eating and drinking establishment would not be compatible with adjacent uses as it has the potential to attract night life, contrary to ZR § 72-21(c); and (4) the proposal to include an eating and drinking establishment use does not reflect the minimum variance as required by ZR § 72-21(e); the Opposition also asserts that: (1) a special permit from the City Planning Commission, pursuant to ZR § 74-781, rather than a variance, is the appropriate form of relief; and (2) a restrictive declaration limits the use of the building to a Use Group 9 use; and

WHEREAS, other community members presented opposition to an eating and drinking establishment; and

WHEREAS, the subject site is located on the west side of Crosby Street, between Broome Street and Spring Street, within the SoHo Cast Iron Historic District; and

WHEREAS, the site has 20 feet of frontage on Crosby Street, a depth of 100 feet, and a lot area of approximately 2,001 sq. ft.; and

WHEREAS, the site is occupied with a vacant two-story building formerly used as a sculptor’s residence/studio with a total floor area of 4,535 sq. ft. (2.27 FAR); and

WHEREAS, the applicant proposes to use the entire building for Use Group 6 use, which may include an eating and drinking establishment; and

WHEREAS, because the proposed Use Group 6 use is not permitted below the second floor in the subject M1-5B zoning district, the requested waiver is necessary; and

WHEREAS, the applicant states that the following are unique physical conditions, which create practical difficulties and unnecessary hardship in developing the subject site in conformance with underlying district regulations: (1) the lot’s narrow width; (2) the underbuilt nature of the existing building; and (3) the obsolescence of the existing building for manufacturing use; and

WHEREAS, as to the width of the lot, the applicant represents that the lot’s narrow width of 20.1 feet at the front lot line and 19.92 feet at the rear lot line results in a usable floor plate of approximately 1,550 sq. ft., which is inefficient for conforming uses, such as warehouses and wholesale distributors; and

WHEREAS, as to the uniqueness of this condition, the applicant represents that of the 150 sites examined within the immediate vicinity - the M1-5B zoning district between Prince Street and Grand Street, and Mercer Street and Lafayette Street - only five (or three percent) had widths of less than 20 feet; and

WHEREAS, the applicant submitted a table, which identifies the lot widths, lot area, and existing and potential FAR for the sites in the study area, which reflects that the site is among the smallest and narrowest

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within the study area, as further evidenced by a radius diagram; and

WHEREAS, as to the underbuilt nature of the building, the applicant represents that the existing site has a proportionately significant amount of development potential, in terms of FAR, compared to the vast majority of sites in the study area; and

WHEREAS, the applicant provided an analysis which reflects that only six lots within the study area with widths less than 25 feet are built to an FAR of less than 50 percent the maximum permitted, such as the subject site, which is at 2.27 FAR (5.0 FAR is the maximum permitted); and

WHEREAS, the applicant represents that the hardship at the site is primarily attributed to the limited and constrained floor plate, which significantly diminishes the viability and revenue that may be generated by a conforming use and; and

WHEREAS, as to the potential to enlarge the existing building or construct a new building at the site, the applicant asserts that enlarging the building would be both logistically and financially infeasible and that a proposal for a new or enlarged building would include considerable risk due to the zoning use limitations at the site and the small footprint, which would limit the use on the upper floors to Joint Living/Work Quarters for Artists (JLWQA); and

WHEREAS, as to the obsolescence of the building for a conforming use, the applicant cites to the following limitations: (1) the small floor plate; (2) the absence of a freight or passenger elevator; (3) the limits on access to the building; (4) the absence of a loading dock; and (5) the location on a narrow street; and

WHEREAS, as to the floor plate, the applicant states that the usable space in the building, after considering wall thickness of between 15 and 17 inches, is approximately 1,550 sq. ft., which the applicant states contributes to the inability to accommodate a modern conforming manufacturing use; and

WHEREAS, as to the absence of an elevator, the applicant asserts that the vertical transfer of goods between floors is difficult; and

WHEREAS, as to the building's accessibility, the applicant asserts that the accessibility is limited to two pedestrian-sized doors on the street frontage, rendering the transfer of goods in or out of the building difficult and, the absence of ramps limits access to the ground floor for bulk shipments; and

WHEREAS, the applicant asserts that the small size and narrowness of the lot precludes the site from accommodating a loading dock; and

WHEREAS, the applicant asserts that Crosby Street has a width of 50 feet, and is considered too constrained to reasonably accommodate large delivery trucks associated with a conforming manufacturing or warehouse use; and

WHEREAS, the applicant notes that although the obsolescence affects the entire building, the proposed Use Group 6 use is permitted above the first floor and, thus,

the applicant is only seeking relief for the first floor and cellar levels; and

WHEREAS, the Opposition asserts that the site can accommodate a conforming use either as the building exists or by enlarging the existing building or constructing a new one; and

WHEREAS, the applicant represents that modern manufacturing and commercial service operations require (1) large floor plates; (2) mechanical systems, such as elevators, that facilitate the vertical movement of goods; and (3) loading bays and wide streets to allow for truck access and that the unique conditions of the site cannot be overcome by enlarging the building or constructing a new one with the same small floor plates; and

WHEREAS, the Board agrees with the applicant that the site's narrow width (the second narrowest in the study area); inefficient floor plates, which limit the number of potential uses; and underbuilt condition, which does not allow for it to be enlarged or demolished and rebuilt in a practical and feasible manner, are unique physical conditions, when considered in the aggregate and create practical difficulties and unnecessary hardship in developing the site in conformance with the applicable zoning regulations; and

WHEREAS, the Board notes that the applicant submitted several previous Board grants, that identified site conditions that it accepted in its analysis of unique conditions, to support its assertion that the conditions on the subject site are similar; and

WHEREAS, the Board finds that the applicant's reliance on the Board's prior grants do not form the basis for granting or denying the subject application as each can be distinguished from the subject case and were mischaracterized in the parties' analyses; and

WHEREAS, as to the financial feasibility of the site, the applicant initially submitted a feasibility study analyzing the following scenarios: (1) an as of right warehouse/storage use on the ground floor, (2) an as of right business service establishment on the ground floor, and (3) the proposal with ground floor and cellar Use Group 6 use; and

WHEREAS, the applicant asserts that the two as of right scenarios would result in a negative rate of return and that the proposed use is the minimum necessary to achieve a reasonable return; and

WHEREAS, at the Board's direction, the applicant confirmed that the property valuation was based on accordingly adjusted comparables and the mezzanine space was included in the original calculations, and provided a discussion of a showroom alternative; and

WHEREAS, in response to the Board's and the Opposition's inquiry, the applicant submitted a supplemental analysis of (1) a new six-story building with business services on the first floor and JLWQA units on the upper floors and (2) an enlarged building with four additional floors to be occupied by business services on the first floor and JLWQA units on the upper floors; and

WHEREAS, the applicant's analysis concludes that neither the new or enlarged building alternatives would

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provide a reasonable return; and

WHEREAS, however, the Opposition asserts that both scenarios would generate reasonable rates of return; and

WHEREAS, the Board has reviewed both sets of financial analyses and concludes that the applicant's assumptions are reasonable and supported by appropriate valuation and comparables; and

WHEREAS, the Board identified several concerns with the Opposition's analysis, which contribute to its contrasting conclusions: (1) it assumes a significantly greater amount of usable space in the business services alternatives; (2) it utilizes a capitalization rate to calculate the value of the net operating incomes of business service spaces that is low for such use and does not measure against market expectations; and (3) it does not factor premium or extraordinary costs into the calculations; and

WHEREAS, the Board accepts the applicant's analysis and based upon its review of the applicant's submissions, has determined that because of the subject site's unique physical conditions, there is no reasonable possibility that development in strict compliance with applicable zoning requirements will provide a reasonable return; 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 notes that many of the buildings in the immediate vicinity are used for Use Group 6 purposes on the first floor with residential or loft space above; and

WHEREAS, the applicant submitted a diagram and photographs of local uses which reflects that the block is occupied by a mix of ground floor commercial uses and JLWQA-studio-type uses; and

WHEREAS, the applicant notes that Use Group 6 use, including an eating and drinking establishment, would be permitted as of right on the building's second floor and that a Use Group 9 catering use would be permitted throughout the building; and

WHEREAS, the applicant notes that the adjacent building to the south is occupied by the six-story Bloomingdale's building, which is accessed from Broadway and Crosby Street and the adjacent building to the north is occupied by a ground floor clothing store with entrances on Broadway and Crosby Street; and

WHEREAS, the applicant notes that every lot with a width narrower than 25 feet, within the study area, is occupied by Use Group 6 retail or eating and drinking use on its first floor; the applicant acknowledges that Use Group 6 uses may not be legal as per the certificates of occupancy in all cases; and

WHEREAS, further, the applicant notes that the existing historic two-story building will remain and that it will not be enlarged and no bulk waivers are sought; and

WHEREAS, the applicant submitted a Certificate of No Effect from the Landmarks Preservation Commission, dated March 19, 2010; and

WHEREAS, the Opposition asserts that the characteristics of the subject block – Crosby Street between Broome Street and Spring Street – can be distinguished from other nearby blocks and that its particular characteristics are not compatible with an eating and drinking establishment use; and

WHEREAS, in response the applicant notes that (1) there are seven eating and drinking establishments operating on the first floor in the study area; and (2) eating and drinking establishments co-exist with residential use throughout the city; and

WHEREAS, the applicant notes that the nearby eating and drinking establishments include (1) a restaurant and bar at the northeast corner of Broome Street and Crosby Street (L'Orange Bleue), which has outdoor seating extending as far as 80 feet north of Broome Street along the east side of Crosby Street; (2) a restaurant and bar at the southwest corner of Spring Street and Crosby Street (Balthazar); and (3) a hotel and restaurant on Crosby Street, just north of Spring Street (the Crosby Street Hotel), which occupies the first floor, outdoors, and terrace level; and

WHEREAS, further, the applicant provided hours of operation and capacity for the noted establishments, which are as follows (1) L'Orange Bleue – bar closes at 2:00 a.m., capacity n/a; (2) Balthazar – bar closes at 2:00 a.m., capacity 221; (3) Crosby Street Hotel – bar closes at 1:00 a.m., capacity 112 for the first floor restaurant and 205 for the first floor total; and

WHEREAS, the Opposition also relies on the history of opposition to an eating and drinking establishment at the site, namely that associated with the application before the New York State Liquor Authority in 2002 and the Community Board's opposition; and concerns about the potential for disruptive night life to occupy the site; and

WHEREAS, the applicant asserts that it is amenable to a conditional approval of an eating and drinking establishment use to relieve concerns about night life activity that would be incompatible with nearby residential uses; and

WHEREAS, the applicant proposes the following conditions on an eating and drinking establishment use: (1) a closing time no later than 12:30 a.m., Sunday through Thursday; (2) a closing time no later than 1:30 a.m., Friday through Saturday; (3) no tables, seating or bar in the outdoor space; (4) no sound system or music in the outdoor space; and (5) a closing time of 12:00 a.m., daily, for the outdoor space; and

WHEREAS, the Board agrees with the applicant that there is a context for eating and drinking establishments within the vicinity of the site and is not persuaded by the Opposition's assertion that it should isolate a single block-long street frontage from the remainder of the applicant's study area and that, even if it did so, the Board is not persuaded that an eating and drinking establishment cannot be operated in a way that is compatible with residential use; and

WHEREAS, however, the Board believes restrictions on eating and drinking establishment use at

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the site, such as (1) hours of operation, (2) exclusion of the outdoor space, (3) restrictions on noise, and (4) limiting the use to a restaurant, rather than a bar, are appropriate; 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

WHEREAS, the Board finds that the hardship herein was not created by the owner or a predecessor in title, but is due to the unique conditions of the site; and

WHEREAS, the applicant asserts that the proposal for Use Group 6 use represents the minimum variance needed to allow for a reasonable and productive use of the site; and

WHEREAS, the applicant represents that the site's location, with limited foot traffic, does not support a retail use and that the narrow building design and multiple floors is only suitable for a single user; and

WHEREAS, the Opposition asserts that restricted Use Group 6 use, which would exclude an eating and drinking establishment would represent a lesser variance yet still be feasible; and

WHEREAS, the Opposition asserts that the site is not uniquely narrow and has identified 11 sites with frontage of less than 20 feet, which are occupied by retail use along Crosby Street; and

WHEREAS, the Opposition also asserts that retail use has been successful along Crosby Street; and

WHEREAS, the applicant responded that (1) four of the businesses with narrow frontage on Crosby Street, prohibit general access from Crosby Street and direct patrons to their other, wider frontage on another street; and that (2) three other retailers use Crosby Street as a secondary access point to their primary access on a busier street, such as Broadway, Lafayette Street, or Spring Street; and

WHEREAS, the applicant also asserts that a number of sites with narrow frontages have narrow frontage just at the street line and then widen to a more standard width, unlike the subject site, which is narrow throughout; and

WHEREAS, the applicant adds that its research of the retail market in the near vicinity reflects that there is a significant turnover rate of retailers with frontage on Crosby Street; and

WHEREAS, as noted above, the Board has reviewed its prior decisions that the applicant and the Opposition have presented either in support or opposition to the inclusion of eating and drinking establishments and can distinguish them and, thus does not find they form the basis for a grant or denial; the Board has included a prohibition on eating and drinking establishments in at least two instances where the Community Board recommended such a limitation and the applicant obliged, which is not the situation in the subject case; and

WHEREAS, the Board notes that the inclusion of potential eating and drinking establishment use in the

subject proposal which maintains the existing undersized building for occupancy by a single Use Group 6 tenant, reduces the risk and increases the viability of the site, which can only feasibly accommodate a single user and a single income stream, unlike the majority of buildings in the area, which are larger and have multiple sources of income throughout the building; and

WHEREAS, further, the Board notes that in cases where it restricted eating and drinking use, the subject buildings were substantially larger and more fully developed and primarily with new residential use that it deemed to provide the required economic relief; the Board finds each of its prior cases to be distinguishable and directs its inquiry to the specific conditions of the subject site; and

WHEREAS, accordingly, the Board finds that the proposal, for the re-use of an existing building where the proposed use is permitted as of right on the second floor, without any enlargement of the building envelope, is the minimum necessary to afford relief, based on the analysis of the site and the economic feasibility; and

WHEREAS, the Opposition's supplemental arguments include (1) that the applicant is required to seek a special permit from the City Planning Commission in lieu of a variance, (2) a restrictive declaration associated with the caretaker's apartment limits the use of the building to Use Group 9 use, and (3) since the DOB notice of objections was revised during the hearing process, the process should begin anew; and

WHEREAS, as to the special permit, the applicant notes that none of the case law submitted by the Opposition sets forth a requirement that an application for a special permit is a required predicate of discretionary relief available to the applicant; and

WHEREAS, specifically the applicant asserts that the case law, which addresses the distinction between the required analysis for a special permit compared to that for a variance and states that variances should be granted sparingly, whereas special permits, absent uniqueness and neighborhood character findings, among other things, require less scrutiny; and

WHEREAS, the applicant asserts that the case law, which confirms that variance standards are more restrictive than those for a special permit, actually supports the applicant's choice to file for the more restrictive form of relief; and

WHEREAS, the Board recognizes the principles set forth in the Opposition's case law that there is a higher threshold for obtaining a variance than for a special permit and that, due to the complexity of the findings, including that a site must have unique conditions, variances are granted sparingly; and

WHEREAS, however, the Board does not find that the case law supports the Opposition's assertion that the variance application is inappropriately before the Board; and

WHEREAS, instead, the Board finds that the variance process, with its five required findings,

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actually reflects the breadth of analysis that the Opposition seeks and that the Opposition's arguments that the special permit should be sought first are actually incompatible with the arguments that they request that the highest threshold be set for granting relief to allow the proposed Use Group 6 use throughout the building; and

WHEREAS, as to the restrictive declaration, the applicant states that it was required to allow for a caretaker's apartment accessory to the Use Group 9 use and that, without the Use Group 9 use, the restrictive declaration is moot; and

WHEREAS, the Board notes that the restrictive declaration is an agreement between the applicant's predecessor in interest and DOB and it is not subject to its review, but adds that DOB states that once the Use Group 9 use is eliminated, the restrictive declaration has no effect; and

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

WHEREAS, the project is classified as an Type I Action pursuant to Section 617.4 of 6NYCRR; 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. 10BSA076M, dated August 8, 2010; 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

WHEREAS, no other significant effects upon the environment that would require an Environmental Impact Statement are foreseeable; and

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment.

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration, 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 Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR §72-21, to permit within an M1-5B

**A true copy of resolution adopted by the Board of Standards and Appeals, February 15, 2011.
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**Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.**

zoning district within the SoHo Cast Iron Historic District, the conversion of an existing two-story building to a Use Group 6 use (including eating and drinking establishment), contrary to ZR § 42-14; *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 October 6, 2010"—thirteen (13) sheets; and *on further condition*:

THAT if the site is operated as an eating and drinking establishment, the term of the grant shall expire on February 15, 2014;

THAT the following shall be the operating conditions for any eating and drinking establishment use at the site: (1) the use is limited to a restaurant which may include a bar only if it is accessory to the restaurant, but excludes a bar or a nightclub as the primary use; (2) the maximum seating capacity, including any accessory bar seating, is limited to 120 occupants; (3) a closing time no later than 11:00 p.m., Sunday through Thursday; (4) a closing time no later than 12:00 a.m., Friday through Saturday; and (5) any use of the outdoor space is prohibited;

THAT the operation of the site shall be in compliance with Noise Code regulations;

THAT the above conditions shall be noted on the Certificate of Occupancy;

THAT the internal floor layouts on each floor shall be as reviewed and approved by DOB;

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)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, February 15, 2011.