

**2017-100-BZ**  
**CEQR #17-BSA-111M**

APPLICANT – Friedman & Gotbaum LLP by Shelly S. Friedman, Esq., for Trustees of the Spence School, Inc., owner.

SUBJECT – Application April 4, 2017 – Special Permit (§73-19) to allow for a Use Group 3 school use (*The Spence School*) contrary to ZR §32-31 (Use Regulations); Variance (§72-21) to permit the development of the building contrary to ZR §33-292 (Proposed building extends 30 ft. into the required open area) and ZR §33-26 (Proposed building extends 20 ft. into the required rear yard. C8-4 zoning district.

PREMISES AFFECTED – 412 East 90<sup>th</sup> Street, Block 1569, Lot 35, Borough of Manhattan.

**COMMUNITY BOARD #8M**

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

**THE VOTE TO GRANT** –

Affirmative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta and Commissioner Scibetta.....5

Negative: .....0

**THE RESOLUTION** –

WHEREAS, the decision of the Department of Buildings (“DOB”), dated March 27, 2017, acting on Application No. 121191352 reads in pertinent part:

1. ZR 32-31, ZR 73-19: Use Group 3 is not permitted in a C8-4 district. BSA Special Permit required.
2. ZR 33-292: New building extends into required 30 ft open area contrary to Zoning Resolution. BSA Variance required.
3. ZR 33-26: New building extends into 20 ft rear yard contrary to Zoning Resolution. BSA Variance required.; and

WHEREAS, this is an application for a special permit, pursuant to ZR § 73-19, and a variance, pursuant to ZR § 72-21, to permit, on a zoning lot located in a C8-4 zoning district, the construction of a Use Group 3 school contrary to applicable use regulations set forth in ZR § 32-31 and applicable open area and rear yard regulations set forth in ZR § 33-292 and 33-26; and

WHEREAS, this application is filed on behalf of the Trustees of the Spence School, Inc., a non-profit private educational institution for young women (“Spence” or the “Applicant”) to facilitate the construction of a new educational and athletic facility; and

WHEREAS, a public hearing was held on this application on November 21, 2017, after due notice by publication in *The City Record*, with continued hearings on March 6, 2018 and April 10, 2018, and then to decision on April 17, 2018; and

WHEREAS, Vice-Chair Chanda performed an

inspection of the site and surrounding neighborhood; and

WHEREAS, Community Board 8, Manhattan, recommends approval of this application; and

WHEREAS, New York City Council Member Benjamin J. Kallos recommends approval of this proposal with the understanding that Spence will provide access to the subject proposed school building to students from nearby P.S. 151 and P.S. 527 for their physical education curricula during school day hours at no cost to those schools; and

WHEREAS, the subject site is located on the south side of East 90th Street, between First Avenue and York Avenue, in a C8-4 zoning district, in Manhattan; and

WHEREAS, the site has approximately 149 feet of frontage along East 90th Street, a depth of 101 feet, 15,005 square feet of lot area and is occupied by a two-story parking garage that, the Applicant notes, is built to the rear lot line without a rear yard or an open area and is proposed to be demolished to facilitate the development proposed herein; and

WHEREAS, the rear lot line of the subject site is coincident with a zoning district boundary line that separates a C8-4 zoning district and an R8B zoning district; and

WHEREAS, the subject site is located within walking distance of Spence’s main school buildings, located at 22 East 91st Street and 17 East 90th Street, which house the school’s fifth through twelfth grades (the “Main Building”), and its lower school building, located at 56 East 93rd Street (the “Lower School”); and

WHEREAS, Spence proposes to construct a six-story building measuring 93 feet to the top of the mechanical bulkhead containing 53,974 square feet of zoning floor area, a floor area ratio of 3.60, built to the rear lot line to a height of 29 feet with a rear yard having a depth of 20 feet above that height; and

WHEREAS, at the subject site, schools without living or sleeping accommodations are permitted by special permit of the Board pursuant to ZR §§ 32-31 and 73-19, an open area at curb level at least 30 foot in depth is required pursuant to ZR § 33-292 and a rear yard of at least 20 feet is required pursuant to ZR § 33-26; and

WHEREAS, accordingly, the Applicant seeks the subject relief; and

WHEREAS, ZR § 73-19 provides as follows: In C8 or M1 Districts, the Board of Standards and Appeals may permit *schools* which have no *residential* accommodations except *accessory* accommodations for a caretaker, provided that the following findings are made:

- (a) that within the neighborhood to be served by the proposed *school* there is

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no practical possibility of obtaining a site of adequate size located in a district wherein it is permitted as of right, because appropriate sites in such districts are occupied by substantial improvements;

- (b) that such *school* is located not more than 400 feet from the boundary of a district wherein such *school* is permitted as-of-right;
- (c) that an adequate separation from noise, traffic and other adverse effects of the surrounding non-*Residential Districts* is achieved through the use of sound-attenuating exterior wall and window construction or by the provision of adequate open areas along *lot lines* of the *zoning lot*; and
- (d) that the movement of traffic through the *streets* on which the *school* is located can be controlled so as to protect children going to and from the *school*. The Board shall refer the application to the Department of Traffic for its report with respect to vehicular hazards to the safety of children within the block and in the immediate vicinity of the proposed site.

The Board may prescribe additional appropriate conditions and safeguards to minimize adverse effects on the character of the surrounding area; and

WHEREAS, the Board notes that in addition to the foregoing, its determination herein is also subject to and guided by, *inter alia*, ZR §§ 73-01 through 73-04; and

WHEREAS, as a threshold matter, the Board notes that the site is located in a zoning district in which a special permit pursuant to ZR § 73-19 is available and the Applicant represents that Spence meets the ZR § 12-10 definition of “school”; and

WHEREAS, with regards to § 73-19(a), Spence states that it has searched for sites of adequate size within a zoning district that would have permitted a Use Group 3 school use as-of-right within the bounds of Community Board 8 and the lower half of Community Board 11 since 2011 and ultimately identified three such sites, including the subject site, within Spence’s price range—one was subject to a zoning lot development agreement that would not have accommodated all of the school’s required programming and the other was purchased by another institution; and

WHEREAS, Spence submits that between losing one potential site to another purchaser and acquiring the subject site in 2011, they continued to monitor real estate listings for appropriate sites, but did not identify an

alternative to the subject site that would permit the proposed use as-of-right; and

WHEREAS, accordingly, the Board finds that, within the neighborhood to be served, there is no practical possibility of obtaining a site of adequate size located in a district wherein it is permitted as of right in satisfaction of ZR § 73-19(a); and

WHEREAS, the Board acknowledges that the rear lot line of the subject site is coincident with a zoning district boundary line separating a C8-4 zoning district and an R8B zoning district, in which a Use Group 3 school without living or sleeping accommodation is permitted as of right, and that the subject site has a depth of 101 feet, accordingly, the proposed building is located not more than 400 feet from the boundary of a district wherein it would be permitted as-of-right as required under ZR § 73-19(b); and

WHEREAS, as to ZR § 73-19(c), Spence asserts, and the Board finds, that the window and sound-attenuating exterior walls of the proposed building will be constructed so as to ensure adequate separation from noise, traffic and other adverse effects of the surrounding C8-4 zoning district and achieve an interior noise level of 45 dBA L10(1) or lower; and

WHEREAS, this application has been referred to the New York City Department of Transportation (“DOT”) Division of School Safety for review, as required in ZR § 73-19, and, by letter dated November 6, 2017, DOT states that it finds the proposed plans acceptable and requested that upon approval of the application and construction of the school, DOT be notified so that they can determine if traffic safety improvements or parking regulation changes are necessary; and

WHEREAS, in addition, Spence represents that the two intersections closest to the site—at East 90th Street and York Avenue to the east and East 90th Street and First Avenue to the west—are signalized crossings with crosswalks allowing for safe access to the site; and

WHEREAS, therefore, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 73-19; and

WHEREAS, the applicant additionally seeks a variance, pursuant to ZR § 72-21, waiving open area and rear yard requirements set forth in ZR §§ 33-292 and 33-26; and

WHEREAS, the subject building is proposed in order to address deficiencies in Spence’s existing physical plant with regards to spaces for earth sciences and ecological studies, athletic and dance programs; specifically, the proposed building will house a gymnasium large enough to accommodate regulation-sized basketball, volleyball and badminton courts, nine squash courts (the minimum required for school team competitions), locker rooms, a new Eco-Lab including a greenhouse, planting terrace, classroom and teaching

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kitchen, a multipurpose space to serve as the home of the school's dance department as well as provide an alternative venue for the school's drama productions, readings, chamber music recitals, film screenings and lectures, and a student study center; and

WHEREAS, the building is proposed to include mechanical space in the cellar, a gymnasium with spectator seating in retractable bleachers on the first floor; a viewing area, spectator seating in fixed bleachers and a training room on the second floor (approximately half of which is also open to the gymnasium below); four double-height squash courts, team rooms and a study center on the third floor; five double-height squash courts, double-height squash spectator seating and locker rooms on the fourth floor; a double-height multi-purpose space and restrooms on the fifth floor (much of which is also open to the fourth floor below); and a classroom, teaching kitchen, office, greenhouse and roof top garden on the sixth floor; and

WHEREAS, Spence submits that it relies on 34 off-site venues in four boroughs for its various athletic programs and that the long travel time to off-campus venues frustrates scheduling in an already highly scheduled academic day; Spence also represents that the proposed building will enable the school to reduce their demand for off-site venues by approximately 30 percent; and

WHEREAS, the proposed building will substantially augment the school's existing on-campus athletic facilities, which are comprised of two non-regulation sized gymnasias (one each in the Main Building and the Lower School Building), a 300 square foot gymnasium in the Main Building utilized for the storage of athletic equipment, a 300 square foot yoga and cycling room in the Main Building, a 1,000 square foot storage room in the gymnasium in the Lower School Building equipped with physical education equipment, and improvised storage spaces; and

WHEREAS, in response to Board inquiry as to whether the gymnasium in the proposed facility is duplicative of the two existing gymnasias, Spence states that the existing gymnasias are utilized for physical education classes, which are mandated by state law for every grade level, their uses is incorporated into the daily school day curriculum, thus they must be located proximate to the primary academic program facilities; further, Spence states that the existing gymnasias lack the necessary height clearances and size for team competition; and

WHEREAS, additionally, Spence states, that both the Main Building and Lower School Building are located mid-block within an R8 zoning district, have been designated as individual landmarks by the New York City Landmarks Preservation Commission ("LPC") and are located within the Expanded Carnegie Hill Historic District; thus, any alteration of the existing

gymnasias to provide the regulation-sized facilities of the subject proposal would likely be in excess of the maximum applicable bulk regulations, require waivers of the Zoning Resolution and have a remote likelihood of LPC approval; and

WHEREAS, in response to Board inquiry as to why the Eco-Lab could not be accommodated elsewhere within Spence's existing physical plant, Spence states, again, that its existing individually landmarked building would require significant and visible alterations in order to accommodate the elevator and stair bulkheads necessary to provide full access to the roof; and

WHEREAS, Spence submits that, in addition to addressing these spatial deficiencies, the proposed building and the regulation-sized courts accommodated therein will enable Spence to host "home" games and competitions like its peer schools; help Spence students qualify for athletics-based college recruitment and financial assistance, which rely on games played on regulation-sized courts; and enable Spence to offer summer camp programs to the greater community; Spence additionally reports that it intends to work with local public schools P.S. 151 and P.S. 527 (the "Public Schools"), which lack their own gymnasias, to provide those schools with access to the proposed gymnasium during specified times; and

WHEREAS, Spence submits that the requested waivers will facilitate floorplates large enough to enable the combination of several different athletic spaces having significant volumetric demands into a single building with efficient circulation; and

WHEREAS, the Board acknowledges that Spence, as an educational institution, is entitled to deference under the law of the State of New York as to zoning and its ability to rely upon programmatic needs in support of the subject variance application; and

WHEREAS, specifically, as held in *Cornell University v. Bagnardi*, 68 NY2d 583 (1986), a zoning board must grant an educational or religious institution's application unless it can be shown to have an adverse effect on the health, safety or welfare of the community and general concerns about traffic and disruption of the residential character of the neighborhood are insufficient grounds for the denial of such applications; and

WHEREAS, based on the above, the Board finds that Spence's programmatic needs create unnecessary hardship and practical difficulty in developing the premises in compliance with the applicable zoning regulations; and

WHEREAS, Spence is a non-profit educational institution and the variance is needed to further its non-profit mission and, thus, the finding set forth in ZR § 72-21(b) need not be made in order to grant the variance requested in this application; and

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WHEREAS, Spence submits that, pursuant to ZR § 72-21(c), the subject variance, if granted, will not substantially impair the appropriate use or development of adjacent properties and will not be detrimental to the public welfare; specifically that the first two floors of the proposed building will replace an existing two-story parking garage that is currently built to the rear lot line to a height of between 22 and 25 feet above grade and provides neither a 30 foot open area above curb level at the zoning district boundary line nor a 20 foot rear yard, thus the proposed building, built to a height of 29 feet above grade, will substantially mimic existing conditions at the site with regards to incursions in the rear yard; and

WHEREAS, in addition, the immediate area, particularly the subject block of East 90th Street, is primarily residential in character—some residential buildings having commercial on their lower floors—with the exception of a parking facility located immediately to the east of the site, a commercial building across East 90th Street from the subject site and industrial and commercial uses located mid-block on East 91st Street, thus the community facility use will be consistent with the existing character of the neighborhood; and

WHEREAS, the Applicant states that the proposed building will operate six days a week between approximately 6:00 a.m. and 9:30 p.m. and expects peak activity to occur from 3:00 p.m. to the early evening hours; Spence states that the school will provide shuttle bus service to the site from its other buildings for grades K-5, that its students, faculty and staff will generally travel to the subject site by foot, spectators are expected to travel to the site by foot or public transportation and that, of teams from other schools visiting to play games at the facility, 66 percent are expected to use public transportation to access and depart the site and 34 percent are expected to arrive and depart by foot; and

WHEREAS, during hearing, the Board expressed concerns regarding the potentially simultaneous use of the athletic, music, dance and classroom spaces in the proposed facility, including the Public Schools' use of the gymnasium for physical education, will adversely affect vehicular and pedestrian traffic networks existing in the immediate area; and

WHEREAS, in response, Spence states that, even including the trips to the site from the Public Schools, there will be no significant adverse pedestrian impacts for the sidewalk analysis location during the midday peak hour of 1:00 p.m. to 2:00 p.m., the time during which the last possible public school group visiting the facility for physical education would be departing the facility by foot; and

WHEREAS, further, Spence states that simultaneous use of the various spaces in the proposed

facility will be minimal: that the only uses of the facility during school day hours of 8:15 a.m. to 3:00 p.m. will be in the Eco-Lab and the Public Schools' use of the gymnasium between the hours of 8:45 a.m. and 1:00 p.m.; that the Athletics Director will develop a schedule of home and away games to minimize scheduling any two sports programs to play home games at the proposed facility on the same afternoon and, on occasions when two home games are scheduled in the same afternoon, the games will be staged to prevent simultaneous arrivals and departure; and that the squash courts will never be used by other schools during the school day because sports are not scheduled during the day in order to not interfere with academic classes; and

WHEREAS, the Board was in receipt of four letters in opposition to the proposal and testimony from a representative of a nearby condominium located on East 90th Street, expressing concerns regarding the existing congested conditions on East 90th Street, the incompatibility of a school use with a commercial zoning district, noise associated with construction of the proposal, noise associated with the school on evenings and weekends once it is in operation, the height of the school and its likelihood to decrease accessible daylight to certain properties; and

WHEREAS, by letter dated April 10, 2018, DOT states that, based on the Level 1 (Trip Generation) screening assessment performed by the Applicant's consultant following the CEQR Technical Manual guidelines and indicating that the subject proposal would generate fewer than 50 vehicle trip-ends during the weekday AM and PM peak hours because the majority of arrivals to the facility are expected by foot or school-provided shuttle bus, the agency agrees with the Board that a detailed traffic analysis is not necessary; and

WHEREAS, the Board notes that the subject use is permitted in a C8-4 zoning district pursuant to special permit upon satisfying certain findings and, those findings having been satisfactorily made in this case, the subject proposal is not, in fact, an incompatible use at the subject site in the subject zoning district; and

WHEREAS, with regards to concerns about noise due to construction of the subject proposal and the loss of light to nearby buildings, the Board notes that as-of-right construction at the site would also contribute to noise in the area and block certain buildings' access to sunlight and also that the height of the building is permitted as-of-right; with regards to concerns that, once in operation, the subject facility will have noise impacts, the Board notes that the Applicant has represented that the mechanical systems for the facility will meet all applicable noise regulations of the New York City Noise Code and the Buildings Code and, thus, not have the potential to result in a significant

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increase in noise levels at any nearby noise receptors, that the proposal itself will not introduce a new noise receptor and, therefore, the proposal would not have the potential to result in any significant adverse noise impacts; and

WHEREAS, in light of the foregoing, the Board finds that the subject proposal will not alter the essential character of the neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

WHEREAS, the applicant represents, and the Board finds, that the hardship claimed as grounds for the variance was not created by the owner or a predecessor in title in accordance with ZR § 72-21(d); and

WHEREAS, Spence submits that the subject proposal is the minimum variance necessary to afford relief and, in support of that assertion, submitted plans for an as-of-right eight-story building with a total height of over 126 feet that can provide the multipurpose space, a regulation-sized gymnasium for basketball, volleyball and badminton and nine squash courts, but provides a gymnasium that is too narrow to accommodate two regulation-sized volleyball courts, as the proposed facility can, rendering it unsuitable for volleyball tournaments; does not provide adequate viewing areas or spectator seating for the squash courts or the gymnasium, respectively; prevents necessary program space adjacencies in the building, i.e., necessitates the relocation of team rooms from adjacent to the gymnasium on the first and second floors to the third floor, which will promote the mixing of different event populations and pose operational, as well as scheduling complexities; splits the locations of the Eco-Lab classroom and the Eco-lab greenhouse and garden onto different floors; reduces the size of the exterior plant area adjacent to the Eco-Lab on the building roof by more than half; requires a greater amount of, yet less efficient, vertical circulation; and, at more than 30 feet taller than the proposed building, will have a greater impact on the light and air available to its immediate neighbors; and

WHEREAS, the Board finds that the subject proposal is the minimum necessary to afford the owner relief; and

WHEREAS, the project is classified as an Unlisted action pursuant to 6 NYCRR, Part 617.2; 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. 17BSA111M, dated April 13, 2018; 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; Open Space; Shadows; Historic and Cultural Resources; Urban Design and Visual Resources; Natural Resources; Hazardous Materials; Water and Sewer Infrastructure; Solid Waste and Sanitation Services; Energy; Transportation; Air Quality; Greenhouse Gas Emissions; Noise; Public Health; Neighborhood Character; or Construction; and

WHEREAS, LPC conducted an archaeological review of the subject site and determined that it was of no archaeological significance; and

WHEREAS, by communication dated September 21, 2017, the Waterfront and Open Space Division of the New York City Department of City Planning (“DCP”) states that they completed review of the proposed project for consistency with the policies and intent of the New York City Waterfront Revitalization Program (“WRP”) under WRP # 17-127 and finds that the action will not substantially hinder the achievement of any WRP policy and is, thereby, consistent with those policies; and

WHEREAS, by letter dated February 27, 2018, the New York City Department of Environmental Protection (“DEP”) states that DEP finds the Revised November 2017 Remedial Action Plan (“RAP”) submitted by the Applicant’s consultant acceptable on condition that the RAP be revised to require that the clean fill used at the site (if required) be tested at the facility/source at a frequency of one (1) sample for every 250 (not 500) cubic yards; and

WHEREAS, DEP further requested that, at the completion of the project, a Professional Engineer-certified Remedial Closure Report—indicating that all remedial requirements have been properly implemented (i.e., installation of vapor barrier; proper transportation/disposal manifests and certificates from impacted soils removed and properly disposed of in accordance with all NYSDEC regulations; and two feet of DEP approved certified clean fill/top soil capping requirement in any landscaped/grass covered areas not capped with concrete/asphalt; etc.)—be submitted to DEP for review and approval; and

WHEREAS, on March 2, 2018, the Applicant submitted a revised RAP indicating that “any new at grade landscaped portions of the Site would have a ‘soil cap’ consisting of two feet of imported clean fill, i.e., tested at the source facility . . . at a frequency of one composite sample per 250 cubic yards,” as requested by DEP; and

WHEREAS, by letter dated March 21, 2018, DEP’s Bureau of Environmental Planning and Analysis states that the subject proposal would not result in significant air quality impacts; and

WHEREAS, by letter dated April 10, 2018, DOT agrees with the Board that a detailed traffic analysis is not necessary; and

WHEREAS, no other significant effects upon the

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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; 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 Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR §§ 73-19 and 72-21, to permit, on a zoning lot located in a C8-4 zoning district, the construction of a Use Group 3 school building contrary to applicable use regulations set forth in ZR § 32-31 and applicable open area and rear yard regulations set forth in ZR § 33-292 and 33-26, *on condition* that all work shall substantially conform to drawings filed with this application marked "Received November 9, 2017"-Twenty (20) sheets; and *on further condition:*

THAT the following shall be the bulk parameters of the building: a rear yard of at least 0 feet to a maximum height of 29 feet, an open area at the rear lot line, which is coincidental with a zoning district boundary line, of at least 0 feet to a maximum height of 29 feet, above such height a rear yard and open area at least 20 feet in depth will be provided, as illustrated on the Board-approved plans;

THAT Spence shall contact DOT School Safety Division upon construction of the school in order for DOT to determine if traffic safety improvements or parking regulation changes are necessary;

THAT at the completion of the project, a Professional Engineer-certified Remedial Closure Report—indicating that all remedial requirements have been properly implemented (i.e., installation of vapor barrier; proper transportation/disposal manifests and certificates from impacted soils removed and properly disposed of in accordance with all NYSDEC regulations; and two feet of DEP approved certified clean fill/top soil capping requirement in any landscaped/grass covered areas not capped with concrete/asphalt; etc.)—shall be submitted to DEP for review and approval;

THAT substantial construction shall be completed pursuant to ZR § 72-23;

THAT a certificate of occupancy shall be obtained

**A true copy of resolution adopted by the Board of Standards and Appeals, April 17, 2018.**

**Printed in Bulletin No. 17, Vol. 103.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

within four (4) years;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s);

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

THAT DOB 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, April 17, 2018.

