

**148-03-BZ**

APPLICANT – Goldman Harris LLC, for The Flower House Condominium, owners; Northwest Real Estate LLC, lessee.

SUBJECT – Application April 9, 2014 – Amendment of a previously approved Variance (§72-21) the conversion of a three-story and four-story and a twelve-story existing manufacturing buildings to residential use above the ground floor and now to proposed the unused development rights for incorporation into a new as-of-right hotel. M1-6 zoning district.

PREMISES AFFECTED –111/113 West 28th Street, north side of West 28th Street between Sixth and Seventh Avenue, Block 804, Lot(s) 1101-1105, Borough of Manhattan.

**COMMUNITY BOARD #5M**

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

**THE VOTE TO GRANT** –

Affirmative: Chair Perlmutter; Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez.....4

Negative:.....0

**THE RESOLUTION** –

WHEREAS, this is an application to reopen and amend four existing variances to facilitate the transfer of unused development rights from Lots 49 and 7502 to Lots 30, 31, and 32; and

WHEREAS, a public hearing was held on this application on September 23, 2014, after due notice by publication in *The City Record*, with a continued hearing on November 18, 2014, and then to decision on December 16, 2014; and

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

WHEREAS, Community Board 5, Manhattan, recommends disapproval of the application, citing the following concerns regarding the proposed amendment to BSA Cal. No. 148-03-BZ to permit the transfer of development rights from Lot 7502 to Lots 30, 31, and 32:

- (1) that hotel development was entirely possible and foreseeable with unused development rights in 2003;
- (2) that there was an active hotel market in the neighborhood surrounding the site in 2003;
- (3) that an assemblage was possible in 2003 but intentionally not pursued by the owner of Lot 7502;
- (4) that permitting the transfer would set a negative precedent that would allow variance sites to receive a windfall;
- (5) that such precedent would encourage conversion of commercial/manufacturing space to residential with no affordability requirements;
- (6) that Lot 7502’s condominium offering plan contemplated the transfer of unused development rights; and
- (7) that Lots 30, 31, and 32 can be developed without Lot 7502’s development rights but rather with Lot 49’s development rights (through Lot 44), which it

endorses; and

WHEREAS, the Hotel Trades Council submitted testimony in opposition to the application, citing the following concerns: (1) that hotel development was entirely possible and foreseeable with unused development rights in 2003; (2) that there was an active hotel market in the neighborhood surrounding the site in 2003; and (3) that allowing the proposed transfer of development rights from Lot 7502 to Lots 30, 31, and 32 undermines the (e) finding that the Board made in BSA Cal. No. 148-03-BZ; and

WHEREAS, the application is brought on behalf of the owners of Lots 30, 31, 32, 49, and 7502 (collectively, “the applicants”); and

WHEREAS, the owner of Lots 30, 31, and 32 (105-109 West 28th Street) (the “Development Parcel”) seeks the Board’s authorization to form a zoning lot with two existing sites under the Board’s jurisdiction: Lot 7502 (111-113 West 28th Street) (the “Flower House Condominium”) and Lot 49 (114-120 West 29th Street) (the “29th Street Buildings”); collectively, the lots comprise the subject site; and

WHEREAS, the site has 107.17 feet of frontage along West 28th Street, 85 feet of frontage along West 29th Street, and 18,976.46 sq. ft. of lot area; it is partially within a C6-4X zoning district and partially within an M1-6 zoning district; and

WHEREAS, the site is occupied by seven buildings; the 29th Street Buildings include the four-story building located at 114 West 29th Street (which has 7,337 sq. ft. of floor area), the 12-story building located at 116-118 West 29th Street (which has 42,908 sq. ft. of floor area), and the three-story building located at 120 West 29th Street (which has 5,727 sq. ft. of floor area); the Flower House Condominium is a seven-story building (which has 21,305 sq. ft. of floor area); the Development Parcel (Lots 30, 31, and 32) is occupied by three, four-story buildings, which are occupied by various uses, including residences, a florist supply establishment, a wholesale florist, and a retail store; and

WHEREAS, the applicants represent that Lot 49 has approximately 27,364 sq. ft. of unused development rights available for transfer to Lots 30, 31, and 32 and that Lot 7502 has approximately 20,993 sq. ft. of unused development rights available for transfer to Lots 30, 31, and 32; and

WHEREAS, the applicants state that Lot 7502 has been subject to the Board’s jurisdiction since October 28, 2003, when, under BSA Cal. No. 148-03-BZ, the Board granted a variance pursuant to ZR § 72-21 authorizing residential use within portions of a building on a site within an M1-6 zoning district, contrary to use regulations; on April 4, 2006, the Board approved an amendment to this grant, which authorized the construction of a mezzanine at the penthouse level; and

WHEREAS, the applicants state that Lot 49 was historically known as Lots 49, 50, and 52; historic Lot 49

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has been subject to the Board's jurisdiction since January 29, 1980, when, under BSA Cal. No. 902-79-BZ, the Board granted a variance pursuant to ZR § 72-21 authorizing the conversion of an existing 12-story manufacturing building to a multiple dwelling on a site within an M1-6 zoning district, contrary to use regulations; historic Lot 50 has been subject to the Board's jurisdiction since January 29, 1980, when, under BSA Cal. No. 1097-79-BZ, the Board granted a variance pursuant to ZR § 72-21 authorizing the conversion of an existing three-story manufacturing building to a multiple dwelling on a site within an M1-6 zoning district, contrary to use regulations; historic Lot 52 has been subject to the Board's jurisdiction since January 29, 1980, when, under BSA Cal. No. 1096-79-BZ, the Board granted a variance pursuant to ZR § 72-21 authorizing the conversion of an existing three-story manufacturing building to a multiple dwelling on a site within an M1-6 zoning district, contrary to use regulations; and

WHEREAS, thus, the Board notes that each of the subject variances involved a change of use of an existing building with little or no impact on bulk; and

WHEREAS, the applicants now seek amendments to the subject variances to reflect the merger of Lots 30, 31, 32, 49, and 7502 in order to facilitate the transfer of unused development rights from Lots 49 and 7502 to Lots 30, 31, and 32; and

WHEREAS, the applicants also propose to modify the site plans of the four variances to reflect the merger of Lots 30, 31, 32, 49, and 7502; and

WHEREAS, the applicants represent that the proposed zoning lot merger and development rights transfer will not have any effect on the existing buildings located on Lots 49 and 7502; and

WHEREAS, in addition, the applicants contend that the proposed transfer of development rights is consistent with the Court's decision in Bella Vista v. Bennett, 89 N.Y. 2d 565 (1997), setting forth the parameters of Board review of requests for the transfer of development rights from sites for which a variance has been granted; and

WHEREAS, the applicants assert that a transfer of the unused development rights from Lots 49 and 7502 is allowed because it is not in conflict with any of the Board's prior actions with respect to those lots; and

WHEREAS, the applicants state that the applications under BSA Cal. Nos. 902-79-BZ, 1097-79-BZ, and 1096-79-BZ reflect that the unused development rights were not considered in the Board's analysis; therefore, the applicants assert that it may be presumed that at the time the rights did not have a value; consequently, allowing Lot 49 to merge with and transfer its development rights to Lots 30, 31, and 32 would not undermine any of the Board's findings in those grants; and

WHEREAS, as for BSA Cal. No. 148-03-BZ, the applicant asserts that the excess development rights of

Lot 7502 did not have any value in 2003, because there were no receiving sites available; in support of this assertion, the applicants analyzed whether any parcel adjacent to Lot 7502 was a viable development site as of 2003; the analysis took into account the ownership of the site (whether it was commonly owned with adjacent parcels such that a development assemblage was possible), the lot width and lot area of the site, the permitted uses at the site, and the degree to which the site could be further developed independent of the available development rights; and

WHEREAS, in addition, the applicant states that the proposed transfer will occur more than ten years after the Board's original grant and that there have been substantial and unforeseeable changes in the economic climate of the city and the real estate market since 2003, including a significant increase in the demand for hotels in the neighborhood surrounding the site; and

WHEREAS, at hearing, the Board directed the applicant to provide additional information about the hotel development market in the neighborhood surrounding the site as of 2003; and

WHEREAS, in response, the applicant provided an analysis, which reflects that there were no land use transfers for hotel use between 2001 and 2004 in the area bound by Sixth Avenue, Seventh Avenue, West 24th Street, and West 31st Street; further, during this period there was a significant downturn in the economy, resulting in little to no hotel development in the area; hence, there was no market for development rights to facilitate hotel development at the time the variance was under consideration by the Board; and

WHEREAS, thus, the applicants state that an approval of the requested development rights transfer from Lots 49 and 7502 do not undermine the integrity of the Board's earlier findings concerning ZR §§ 72-21(b) or 72-21(e) because the facts of the instant application are readily distinguishable from those underlying the Court's holding in Bella Vista; and

WHEREAS, the applicants conclude that the use of the development rights as a result of the proposed zoning lot merger is therefore not inconsistent with the Board's prior approvals; and

WHEREAS, the Board notes that Bella Vista concerned a permit request for a new as-of-right residential building proposed to be built through the transfer of development rights—from a site in which the Board granted a use variance to permit operation of a movie theater in a residential zoning district, to a separate adjacent site under common ownership—for development of a complying residential building; and

WHEREAS, the Court held that review and approval of such transfers by the Board was required, inter alia, because the basis for the original grant, particularly with respect to the findings of financial hardship under ZR § 72-21(b) and minimum variance needed to provide relief under ZR § 72-21(e), may be

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implicated by the proposed transfer; and

WHEREAS, the Board notes that, unlike in Bella Vista, the transferring sites (Lots 49 and 7502) and the receiving site (Lots 30, 31, and 32) have been under separate, unrelated ownership since the Board's grants; therefore, the owners of Lots 49 and 7502 lacked control over the timing and nature of the development of Lots 30, 31, and 32; and

WHEREAS, the Board also notes that a brief period of time elapsed between the date of the Bella Vista variance grant and the date of the subsequent permit application which also distinguishes that case from the proposed development rights transfer under review in the subject application; and

WHEREAS, the Board notes that in Bella Vista, the permit application proposing to use floor area transferred from the variance site was filed only three years after the Board grant, while the variances for the subject site were granted in 1980 (34 years before the filing of the instant application) and in 2003 (10 years before the filing of the instant application); and

WHEREAS, the Board agrees that the differences in timing and in the health of the respective real estate markets distinguish the Bella Vista case from the instant case and supports the conclusion that the use of Lots 49 and 7502's unused development rights was not foreseeable by the owner of Lots 30, 31, and 32 or the Board; and

WHEREAS, the Board finds that, with respect to BSA Cal. Nos. 902-79-BZ, 1097-79-BZ, 1096-79-BZ, and 148-03-BZ, the proposed transfer of development rights does not implicate or affect the basis for its findings in general, and specifically the (b) and (e) finding, at the time that they were made; and

WHEREAS, the Board observes that this finding is based on both the infeasibility of assemblage at the time of the grants and on the changing real estate market conditions in the neighborhood surrounding the site; and

WHEREAS, turning to the concerns of Community Board 5 and the Hotel Trades Council (the "Opposition"), as noted above, the Board finds that the proposal is not in conflict with the Bella Vista case and is consistent with the Board's precedent applying Bella Vista and disagrees that Lot 7502's development rights' value, such as they were, could be realized in 2003; similarly, the Board disagrees that there was an active market for hotel development in the neighborhood

surrounding the site in 2003 and finds that the evidence in the record supports the applicants' assertion that hotel development was not occurring in the neighborhood in 2003; as for the Opposition's concerns regarding precedent, the Board observes that, under Bella Vista, it must determine on a case-by-case basis whether a proposed lot merger undermines a prior variance; and

WHEREAS, the Board has considered the Opposition's remaining contention and finds them without merit and/or irrelevant to the instant application; and

WHEREAS, based upon its review of the record, the Board does not object to the proposed merger of Lots 30, 31, 32, 49, and 7502; and

WHEREAS, additionally, the Board does not object to a transfer of unused development rights from Lots 49 and 7502 to Lots 30, 31, and 32, subsequent to the proposed zoning lot merger, but notes that any further changes to Lots 49 and 7502 that are inconsistent with prior approvals are subject to the Board's review and approval.

*Therefore it is Resolved*, that the Board of Standards and Appeals *reopens* and *amends* the resolutions, having been adopted on January 29, 1980 and October 28, 2003, so that as amended this portion of the resolutions shall read: "to permit the merger of Lots 49, 7502, 30, 31, and 32 and the associated modifications to the BSA-approved site plan, *on condition* that all site conditions will comply with drawings marked 'Received November 5, 2014'-(5) sheets; and *on further condition*:

THAT the zoning calculations, including any transfer of development rights, shall be subject to DOB's review and approval and shall be in full compliance with underlying bulk regulations;

THAT the site shall remain subject to the Board's jurisdiction, including modifications to the buildings on the site;

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

THAT DOB shall ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted."

Adopted by the Board of Standards and Appeals, December 16, 2014.

**A true copy of resolution adopted by the Board of Standards and Appeals, December 16, 2014.**

**Printed in Bulletin No. 51, Vol. 99.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

