

343-12-BZ

APPLICANT – Akerman Senterfitt, LLP., for Ocean Ave Education Support, Inc., owner.

SUBJECT – Application December 19, 2012 – Variance (§72-21) to permit the construction of a Use Group 3 school (*Brooklyn School for Medically Frail Children*) with dormitory facilities in a split zoning lot, contrary to lot coverage(§24-11), yard requirements (§24-382, §24-393, §24-33) and use regulations (§22-13). R1-2/R7A zoning district.

PREMISES AFFECTED – 570 East 21st Street, between Dorchester Road and Ditmas Avenue, Block 5184, Lot(s) 39, 62, 66, Borough of Brooklyn.

COMMUNITY BOARD #14BK

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Commissioner Ottley-Brown and Commissioner Montanez.....3

Absent: Vice-Chair Hinkson.....1

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Brooklyn Borough Commissioner, dated July 16, 2015, acting on Department of Buildings Application No. 320581438, reads in pertinent part:

1. ZR 24-35 Proposed School (Use Group 3) does not provide the required side yards and requires a variance from the Board of Standards and Appeals pursuant to ZR 72-21;
2. ZR 24-382 Proposed School (Use Group 3) does not provide the required rear yard equivalent and requires a variance from the Board of Standards and Appeals pursuant to ZR 72-21;
3. ZR 24-393 Proposed School (Use Group 3) does not provide the required rear yard and requires a variance from the Board of Standards and Appeals pursuant to ZR 72-21;
4. ZR 24-11 Proposed School (Use Group 3) exceeds maximum lot coverage and requires a variance from the Board of Standards and Appeals pursuant to ZR 72-21;
5. ZR 22-13 Proposed School Dormitory (Use Group 3) is not permitted in R1-2 district per ZR 22-13 and requires a variance from the Board of Standards and Appeals pursuant to ZR 72-21;
6. ZR 24-33 Proposed School (Use Group 3) does not comply with permitted obstructions in required yards per ZR 24-33 and requires a variance from the Board of Standards and Appeals pursuant to ZR 72-21; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site within an R1-2 zoning district, and also within an R7A zoning district, comprised of three separate tax lots, the construction of a Use Group 3 school that does not comply with the zoning requirements for side yards, rear yard equivalent, rear

yards, lot coverage, dormitory use and permitted obstructions in required yards, contrary to ZR §§ 24-35, 24-382, 24-393, 24-11, 22-13, and 24-33; and

WHEREAS, the application is brought on behalf of the Brooklyn School for Medically Frail Children (the “School”), a non-profit educational institution chartered by the Board of Regents of the State of New York; and

WHEREAS, a public hearing was held on this application on September 9, 2014, after due notice by publication in the *City Record*, with continued hearings on October 28, 2014, December 16, 2014, February 24, 2015, May 19, 2015, June 23, 2015 and then to decision on July 28, 2015; 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 14 Brooklyn, recommends approval of this application; and

WHEREAS, certain neighbors testified in opposition to the application, including residents of adjacent buildings who were represented by counsel, as well as the Ditmas Park East Association; and

WHEREAS, those in opposition to the project are referred to collectively herein as the “Opposition”; and

WHEREAS, the Opposition’s primary concerns are that: (1) the Site is not burdened by unique physical conditions; (2) that the waivers sought herein will alter the essential character of the surrounding neighborhood; (3) that the School created the subject hardship upon purchasing the Site because the Site is partially within an R1-2 zoning district; (4) that the proposed building is not going to be used as a school but as a nursing facility; and (5) that because the proposed building is not a school but a nursing facility, the applicant must obtain a Certificate of Need from New York State before commencing the development contemplated herein; and

WHEREAS, the School represents that it is constructing a school, and not a nursing facility, and that DOB has determined that the proposed development constitutes a school under the Zoning Resolution; and

WHEREAS, in support of its position, the School notes that it is chartered by the New York State Board of Regents as a New York not-for-profit education corporation comprised of a day and residential program with a projected enrollment of 50 students, 20 of whom are projected as residential students; and

WHEREAS, the School notes that it will enroll students consistent with the New York Education Law and regulations promulgated by the New York State Commissioner of Education, and that only students who are referred to the School by Committees on Special Education (established pursuant to Article 89 of the New York Education Law) or Committees on Preschool Education may be enrolled at the School; and

WHEREAS, the School represents that it will operate on a 12-month school year (five days per week, at least six hours per day) in order to accommodate the needs of its students who, owing to their disabilities, require year-round intensive and individualized special

education s

WHEREAS, the Board notes that no Certificate of Need is required where, as here, the proposed development is a school and not a health care facility or nursing home, and notes further that while the School need not obtain a Certificate of Need the nursing services provider with which it will contract may do so without prejudice to the School's status as a New York not-for-profit education corporation; and

WHEREAS, the site consists of three tax lots (lots 39, 62 and 66) located on Block 5814 in Brooklyn (the "Site"); Block 5814, Lot 39 is a 5,000 sq. ft. lot with 50 feet of frontage along East 21st Street, between Dorchester Road and Ditmas Avenue, located within an R7A zoning district; Block 5814, Lots 62 and 66 are adjacent 5,500 sq. ft. lot lots each with 50 feet of frontage along Ocean Avenue, between Dorchester Road and Ditmas Avenue, located within an R1-2 zoning district, thus the Site has an area of 16,000 sq. ft. and is located partially within an R1-2 zoning district and partially within an R7A zoning district; and

WHEREAS, Block 5814, Lots 9 and 62 are each occupied by a single-family residence; Block 5814, Lot 66 is vacant; and

WHEREAS, the School proposes to construct, at the Site, a private residential and day school for medically frail students who require breathing ventilation and/or respiratory care during all our part of the school day; and

WHEREAS, the School proposes to construct the proposed building to accommodate its programmatic needs; and

WHEREAS, the proposed building will have a total floor area of 22,897 sq. ft. (1.46 FAR); a height of 35'-0"; side yards of 5'-0" and 8'-7 1/2" (two side yards of 8'-7 1/2" each are required in the R1-2 portion of the Site, pursuant to ZR § 24-35); lot coverage of 67-percent in the R1-2 zoning district (lots 62 and 66) (a maximum lot coverage of 55-percent is permitted in the R1-2 zoning district) and 100-percent in the R7A zoning district (lot 39) (a maximum lot coverage of 65-percent is permitted); an obstruction in the rear yard which is not permitted under ZR § 24-33; a 10'-0" rear yard (a 30'-0" rear yard is required pursuant to ZR § 24-393); 13 Use Group 3 dormitory rooms (containing a total of 21 nursing home beds) for non-ambulatory students and students who are not able to travel safely (which are not permitted as-of-right within the R1-2 portion of the Site pursuant to ZR § 22-13); and will not provide a rear yard equivalent (a 60'-0" rear yard equivalent is required on the subject lots which collectively constitute a through lot is required pursuant to ZR § 24-382); and

WHEREAS, because the proposed enlargement does not comply with the applicable bulk and use regulations in the subject zoning districts, the School seeks the requested variance; and

WHEREAS, the School states that the variance sought herein is necessary to meet its programmatic need, and mission, to provide high quality, individualized education to students who are ventilated and too medically frail to be educated in traditional school environments; and

WHEREAS, the School notes that in order to meet its programmatic needs, the proposed building has been designed as per NYC Codes, American with Disabilities Act Standards, Department of Education regulations and the Facilities Guidelines Institute 2010 Guidelines for Design and Construction of Health Care Facilities (the "FGI Guidelines") and will include, *inter alia*, 13 Use Group 3 dormitory rooms (containing a total of 21 nursing home beds) for non-ambulatory students and students who are not able to travel safely, which are not permitted as-of-right within the R1-2 portion of the Site; and

WHEREAS, the School notes further that in addition to the foregoing regulations and guidelines, instructional and clinical services specific to medically frail students requires a non-traditional approach to classroom design and configuration, including "learning centers" which have been incorporated into the proposed building in order to provide both group and individualized instruction and which are proposed to be staffed by up to one teacher, one paraprofessional and two aides per center; and

WHEREAS, the School also notes that its programmatic needs also include the provision of speech, occupational and physical training within the learning centers, as well as adaptive physical education and occupational and physical therapy, which requires specialized equipment; and

WHEREAS, lastly, the School notes that the design of the proposed building allows for interior flexibility such that the School will be able to cater certain services to individual student needs; and

WHEREAS, the School asserts that an as-of-right development would not satisfy the School's programmatic needs; and

WHEREAS, specifically, the School states that the as-of-right development precludes the maintenance of a continuous horizontal plan for the building, which is integral to the School's mission to serve medically frail school-age children who require special breathing equipment; and

WHEREAS, the School notes that all of the bulk waivers requested herein are sought in order to achieve a continuous horizontal plan for the proposed building, which will enable the School to provide the safest and most rational handicap accessible learning environment for its students; absent a horizontal plan, students would have to be moved in their hospital beds and/or respirators, thereby interfering with the School's programmatic need to provide high quality individualized and group education to ventilated and medically frail students; and

WHEREAS, thus, an as-of-right development is inadequate to meet the School's programmatic need of provide a learning environment that is tailored to its medically frail students; and

WHEREAS, the School notes that, in addition to the foregoing, an as-of-right development would, by virtue of a vertical separation of services, be more costly to construct and maintain and would require additional staff dedicated solely to the movement of students throughout the School buildings; and

WHEREAS, thus, the School contends that the requested waivers are both modest and essential to its

ability to meet its programmatic needs; and

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

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

WHEREAS, based upon the above, the Board finds that the programmatic needs of the School along with the existing constraints of the Site create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

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

WHEREAS, the School represents that, pursuant to ZR § 72-21(c), the variance, if granted, will not alter the essential character of the neighborhood, will not substantially impair the appropriate use or development of adjacent property, and will not be detrimental to the public welfare; and

WHEREAS, the School states that with the exception of the proposed student dormitories, the use of the proposed building is permitted as-of-right in the subject zoning districts; and

WHEREAS, the School states that proposed building has been designed to be contextual with the surrounding neighborhood to the extent possible in light of the School's programmatic requirements, and notes that, in an attempt to minimize impact on the surrounding neighborhood, (1) there will not be any pedestrian or vehicular ingress at the Ocean Avenue frontage of the proposed building; (2) side yards are being provided along the lot line within the R1-2 zoning district; and (3) the primary ingress and egress for the building, including the entrance to the subsurface parking located on the Site, will be located at the East 21st Street frontage and located within the R7 zoning district; and

WHEREAS, accordingly, the School asserts that the proposal will have no negative impacts on the surrounding neighborhood; and

WHEREAS, the Board agrees with the School that the proposal 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 School states that, per ZR § 72-21(d), the hardship was not self-created; and

WHEREAS, the Board finds that the hardship herein was not created by the School; and

WHEREAS, the School represents that, consistent with ZR § 72-21(e), the requested waivers are the minimum necessary to accommodate its current and

projected programmatic needs; and

WHEREAS, the Board finds that the requested relief is the minimum necessary to allow the School to fulfill its programmatic needs; and

WHEREAS, therefore, 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 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 CEQR No. 13-BSA-071K, dated June 2, 2015; 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 Appeals issues a Negative declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617 and § 6-07(b) of 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 and grants a variance to permit, on a site within an R1-2 zoning district, and also within an R7A zoning district, the construction of a Use Group 3 school that does not comply with the zoning requirements for side yards, rear yard equivalent, rear yards, lot coverage, dormitory use and permitted obstructions in required yards, contrary to ZR §§ 24-35, 24-382, 24-393, 24-11, 22-13, and 24-33, *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 June 2, 2015"– sixteen (16) sheets; and *on further condition*:

THAT the site shall be limited to a maximum floor area of 22,897 sq. ft. (1.46 FAR) and the total height of the building shall be limited to 35'-0", exclusive of permitted obstructions, as illustrated on the BSA-approved plans, side yards of 5'-0" (north) and 8'-7 1/2" (south); lot coverage of 67-percent in the R1-2 zoning district (lots 62 and 66) and 100-percent in the R7A zoning district (lot 39); an obstruction in the rear yard which is not permitted under ZR § 24-33; a 10'-0" rear yard; no rear yard equivalent; and 13 Use Group 3 dormitory rooms (containing a total of 21 nursing home beds);

THAT any change in the use, occupancy, or operator of the School shall require the Board's approval;

THAT all DOB and related agency application(s) filed in connection with the authorized use and/or bulk will be signed off by DOB and all other relevant agencies by July 28, 2019;

THAT this approval is limited to the relief granted by the Board in response to specifically cited 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,
July 28, 2015.

**A true copy of resolution adopted by the Board of Standards and Appeals, July 28, 2015.
Printed in Bulletin No. 32, Vol. 100.**

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

