

371-01-BZ

APPLICANT – Greenberg Traurig LLP, for 104 Charlton Street Condominium, owner; 537 Greenwich Owner LLC, lessee.

SUBJECT – Application May 19, 2016 – Amendment of a previously variance to facilitate the transfer of unused development rights from the variance site for incorporation into a new as-of-right development. M1-6 (IHDA) zoning district.

PREMISES AFFECTED – 104 Charlton Street, Block 7502, Borough of Manhattan.

COMMUNITY BOARD #2M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

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

Negative:.....0

Absent: Commissioner Montanez.....1

THE RESOLUTION –

WHEREAS, this is an application to reopen and amend a variance, previously granted by the Board, which permitted residential uses in a seven-story former warehouse building and the construction of an additional story for residential use in an M1-6 zoning district; and

WHEREAS, the purpose of this application is to facilitate the transfer of 12,316 sq. ft. of unused development rights appurtenant to the subject site by the owner of the site to the owner of a development site (tentatively comprised of Block 597, Lots 49 and 46, the “Development Site”) to be incorporated into a mixed-use commercial and residential building; and

WHEREAS, a public hearing was held on this application on September 27, 2016, after due notice by publication in *The City Record*, with a continued hearing on December 6, 2016, and then to decision on the same date; and

WHEREAS, Vice-Chair Hinkson, Commissioner Ottley-Brown, Commissioner Montanez and Commissioner Chanda performed inspections of the subject site and surrounding neighborhood; and

WHEREAS, Community Board 2, Manhattan, recommends approval of this application; and

WHEREAS, the application is brought on behalf of 104 Charlton Street Condominium, which owns the subject site and seeks the Board’s authorization to merge the subject site with the Development Site; and

WHEREAS, the subject site is located on the south side of Charlton Street, between Greenwich Street and Hudson Street, within an M1-6 zoning district and the Special Hudson Square District, in Manhattan; and

WHEREAS, the site has approximately 49 feet of frontage along Charlton Street, 5,552 sq. ft. of lot area and is occupied by an eight-story building containing 36,689 sq. ft. of floor area; and

WHEREAS, the Board has exercised jurisdiction over the subject site since May 14, 2002, when, under the

subject calendar number, the Board granted a variance permitting residential use on the second through seventh floors, and a portion of the first floor, of the then-seven-story building and the addition of an eight story, also for residential use, contrary to applicable use regulations; and

WHEREAS, by letter dated May 23, 2014, the Board approved the change in use of a portion of the ground floor of the subject building from a catering facility to a graphic design studio as substantially compliant with the variance; and

WHEREAS, the applicant represents that no changes to the subject building are associated with the proposed merger of the zoning lots and development rights transfer; and

WHEREAS, in addition, the applicant contends that the proposed transfer of development rights is consistent with the New York Court of Appeals’ 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 applicant asserts that the transfer of the unused development rights from the subject site is not in conflict with the Variance; and

WHEREAS, the applicant notes that the Board made all of the findings required pursuant to ZR § 72-21 in the resolution for the previously approved variance and that the value of more than 16,000 sq. ft. of excess development rights were, indeed, considered and accepted by the Board as part of the estimated “as is” value of the site at that time; and

WHEREAS, thus, the applicant states that an amendment to the variance to facilitate the transfer of the unused development rights from the subject site to the Development Site does not undermine the integrity of the Board’s earlier findings with regards to 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, specifically, the applicant submits that, at the time of the variance, the subject premises were held in separate and unrelated ownership from all other parcels on the subject block and that 14 years have elapsed since the grant of the variance, at which time excess the subject excess development rights were considered; 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 the operation of a movie theater in a residential zoning district, to a separate adjacent site under common ownership—for the 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

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under ZR § 72-21(e), may be implicated by the proposed transfer; and

WHEREAS, the Board credits the applicant's assertions that, unlike in *Bella Vista*, the subject site and Development Site have been under separate, unrelated ownership since the 2002 variance grant and that, therefore, the applicant lacked control over the timing and nature of the development of the Development Site; and

WHEREAS, the Board also notes that a brief period of time elapsed between the issuance of the variance underlying the *Bella Vista* decision and the date of the permit application in which the owner proposed to use floor area transferred from the variance site, further distinguishing that case from the instant application; and

WHEREAS, the Board acknowledges 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, whereas the subject variance was issued 14 years ago; and

WHEREAS, finally, the Board notes that the value of more than 16,000 sq. ft. of excess development rights at the site was considered as part of the Board's findings in its 2002 grant of the subject variance and that a transfer of unused development rights from the site, as herein proposed, was foreseeable; and

WHEREAS, therefore, the Board finds that the instant application is distinguished from *Bella Vista* and that the proposed transfer of development rights does not implicate or affect the basis of its findings pursuant to ZR § 72-21, specifically the (b) and (e) findings, at the time that they were made; and

WHEREAS, based upon its review of the record, the Board does not object to the transfer of unused development rights from the subject site to the Development Site or the proposed zoning lot merger, but notes that any further changes to the subject site 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 resolution, having been adopted on May 14, 2002, so that as amended this portion of the resolution shall read: "to permit the merger of the subject site with contiguous parcels on Block 597, in Manhattan, and the associated modifications to the BSA-approved site plan; and *on 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;

A true copy of resolution adopted by the Board of Standards and Appeals, December 6, 2016.

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Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

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; and

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 6, 2016.

