

**174-04-BZ**

APPLICANT – Kramer Levin Naftalis & Franked LLP, for 124 West 24th Street Condominium, owner.

SUBJECT – Application October 31, 2014 – Amendment to approve conveyance of unused development rights appurtenant to the subject site previously granted by the Board. M1-5 zoning district.

PREMISES AFFECTED – 124 West 24<sup>th</sup> Street, location on the south side of West 24th Street, between Sixth and Seventh Avenues. Block 799, Lots 1001, 1026. Borough of Manhattan.

**COMMUNITY BOARD #4M**

**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, this is an application to reopen and amend the variance granted by the Board under BSA Cal. No. 174-04-BZ (the “Variance”), which permitted the conversion, from commercial to residential use, of the second through sixth floors of the building known as and located at 124 West 24<sup>th</sup> Street, in Manhattan (the “Building”); and

WHEREAS, the purpose of this application is to facilitate the transfer of unused development rights appurtenant to the subject site (Block 799, Lots 1001-1026) by the owner of the site, 124 West 24<sup>th</sup> Street Condominium (the “Condominium”) to the owner of a development site (the “Development Site”) within a zoning lot to be created upon the merger of the subject site with contiguous parcels located on Block 799 (the “Proposed Zoning Lot Merger”); and

WHEREAS, a public hearing was held on this application on March 10, 2015, after due notice by publication in *The City Record*, with a continued hearing on 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 and Commissioner Ottley-Brown; and

WHEREAS, Community Board 4, Manhattan, recommends that the Board deny this application; and

WHEREAS, the application is brought on behalf of the Condominium, which owns the subject site and wishes to enter into the Proposed Zoning Lot Merger, for which it seeks the Board’s authorization; and

WHEREAS, the subject site is an interior lot located on the south side of West 24<sup>th</sup> Street, between Avenue of the Americas and Seventh Avenue, in Manhattan, within an M1-6 zoning district; and

WHEREAS, the subject site has a lot area of approximately 6,606 sq. ft. and the Building contains approximately 32,027 sq. ft. of floor area (4.83 FAR); and

WHEREAS, the Board notes that the Variance limited the FAR of the Building to a maximum of 4.81 FAR, a ratio believed to reflect the then-existing amount of FAR in the Building; the maximum permitted FAR was amended by Letter of Substantial Compliance dated

February 24, 2006, to reflect the actual as-built condition of the Building; and

WHEREAS, the Building contains retail use on the ground floor and, as authorized by the Variance, residential uses on the second through sixth floors; and

WHEREAS, the Board notes that the Variance involved the change of use of certain floors within the existing Building with no impact on bulk; and

WHEREAS, the Condominium represents that there are not any changes to the Building associated with the Proposed Zoning Lot Merger and development rights transfer; and

WHEREAS, in addition, the applicant contends 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 applicant asserts that a transfer of the unused development rights from the subject site is not in conflict with the Variance; and

WHEREAS, the applicant notes that the economic feasibility analysis submitted in support of the Variance incorporated the value of the subject site’s unused development rights, thus the Board considered the value of such rights when it determined that a conforming use of the Building could not generate a reasonable return; and

WHEREAS, the applicant asserts that the valuation of the unused floor area at the subject site at the time of the Variance, \$45 per square foot, reflected the fact that unused floor area could be utilized at the site, but that such utilization was constrained by the presence of the Building, as well as the fact that the market for a transfer of the site’s unused floor area was, at the time of the Variance, limited; and

WHEREAS, the applicant notes that, in considering the underlying Variance, the Board articulated its concern that the \$45 per square foot value was too high, but concluded that a conforming development would not yield a reasonable rate of return at the site; and

WHEREAS, thus, the applicant states that an amendment of 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 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 applicant concludes that the use of the development rights as a result of the Proposed Zoning Lot Merger is therefore not inconsistent with the Variance; 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 development of a complying residential building; and

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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 implicated by the proposed transfer; and

WHEREAS, the Board notes that, unlike in *Bella Vista*, the subject site and the Development Site have been under separate, unrelated ownership since the Board's grants; therefore, the Condominium 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 the Proposed Zoning Lot Merger; 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 subject Variance was issued in 2005 (approximately ten 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 the subject site's unused development rights was not foreseeable by the owner of the Development Site or the Board; and

WHEREAS, the Board finds that 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 Variance and on the changing real estate market conditions in the neighborhood surrounding the subject site; and

WHEREAS, based upon its review of the record, the Board does not object to the Proposed Zoning Lot Merger or transfer of unused development rights from the subject site, 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; and

*Therefore it is Resolved*, that the Board of Standards and Appeals *reopens* and *amends* the resolutions, having been adopted on June 14, 2005, so that as amended this portion of the resolutions shall read: "to permit the merger of the subject site with contiguous parcels located on Block 799, 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;

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, 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.**

