

125-14-BZ

CEQR #14-BSA-169M

APPLICANT – Goldman Harris LLC, for 350 East Houston LLC c/o BLDG Management Inc., owner.

SUBJECT – Application June 5, 2014 – Variance (§72-21) to facilitate the construction of a ten-story mixed-use forty -six (46) residential dwelling units and retail on the ground floor and cellar. R8A zoning district.

PREMISES AFFECTED –11 Avenue C, between East 2nd Street & East Houston Street, Block 384, Lot 33, Borough of Manhattan.

COMMUNITY BOARD #3M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter; Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez4
Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Department of Buildings (“DOB”), dated May 7, 2014, acting on DOB Application No. 121185092, reads in pertinent part:

1. Proposed Use Group 6 is not permitted as-of-right in an R8A district, per ZR 22-10;
2. Proposed lot coverage (corner lot and through lot portion) exceeds the maximum permitted, and is therefore contrary to ZR 23-145; and

WHEREAS, this is an application under ZR § 72-21, to permit, on a site within an R8A zoning district, the construction of a ten-story mixed residential and commercial building that does not comply with the zoning requirements for use and lot coverage, contrary to ZR §§ 22-10 and 23-145; and

WHEREAS, a public hearing was held on this application on November 25, 2014, after due notice by publication in the *City Record*, with a continued hearing on January 6, 2015, and then to decision on January 30, 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 3, Manhattan, and Councilmember Rosie Mendez recommend disapproval of this application and identify the following primary concerns with the proposal: (1) it lacks affordable housing units; (2) it includes a Use Group 6 use on the ground floor, which is undesirable and incompatible with the neighborhood; (3) it is not the minimum variance necessary; (4) it will result in the removal of a gasoline station, which is an important community resource; and (5) it does not include a community facility, which would be an important community resource; and

WHEREAS, certain members of the surrounding community, including the East Village Community

Coalition, submitted testimony in opposition to the application (the “Opposition”), citing many of Community Board 3 and Councilmember Mendez’s concerns, as well as the following additional concerns: (1) the toxic condition of the site; and (2) the height of the proposed building and its incompatibility with the low-rise character of the Lower East Side and East Village; and

WHEREAS, the subject site is a trapezoidal corner lot located entirely within an R8A zoning district within an Inclusionary Housing Designated Area; its shape is formed by the intersection of East Second Street, Avenue C, and East Houston Street; and

WHEREAS, the site has 122.22 feet of frontage along East Second Street, 40.36 feet of frontage along Avenue C, 123.28 feet of frontage along East Houston Street, and 5,874.3 sq. ft. of lot area; and

WHEREAS, the applicant represents that the site has been operated as a gasoline service station (Use Group 16) since at least 1960, when, under BSA Cal. No. 381-60-BZ, the Board authorized such operation for a term of 20 years; the 1960 grant was amended and extended at various times and reinstated in 2000 under BSA Cal. No. 130-99-BZ and in 2008 under BSA Cal. No. 55-08-BZ; the 2008 grant was for a term of ten years, to expire on July 1, 2018; and

WHEREAS, the applicant proposes to construct a ten-story mixed residential (Use Group 2) and commercial (Use Group 6) building with 42,293 sq. ft. of floor area (7.20 FAR) (37,743 sq. ft. of residential floor area (6.43 FAR) and 4,550 sq. ft. of commercial floor area (0.77 FAR)), 100 percent lot coverage, 46 dwelling units, and a building height of 105 feet; the applicant notes that the proposed 7.20 FAR reflects an increase that will be achieved through the purchase of bonus development rights through a qualified generating site pursuant to the Inclusionary Housing Program set forth in ZR § 23-90; and

WHEREAS, in order to construct the building as proposed, the applicant seeks the following waivers: (1) use (commercial uses are not permitted in the subject R8A district, per ZR § 22-10); and (2) lot coverage (a maximum lot coverage of 78 percent is permitted, per ZR § 23-145); and

WHEREAS, the applicant states that, in accordance with ZR § 72-21(a), the following are unique physical conditions which create practical difficulties and unnecessary hardships in developing the site in compliance with applicable regulations: (1) the irregular shape of the site; and (2) the site’s subsurface contamination; and

WHEREAS, the applicant states that the site has an irregular trapezoidal shape owing to its location at the intersection of three streets; as a result, the depth of the site (measured north to south) varies from approximately 56 feet at its western boundary to approximately 40 feet at its eastern boundary; thus, the site at all points is

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unusually shallow; in addition, the site is wide (measured east to west) relative to depth, with a lot width of approximately 122 feet; and

WHEREAS, the applicant contends that the site shape is unique and submitted a study of nearby sites, which supports this contention; and

WHEREAS, the applicant also asserts that the site's irregular shape creates a practical difficulty complying with the lot coverage requirements of the subject R8A district, in that if the site is limited to 78-percent lot coverage, the building is limited to a depth of 40 to 43 feet, which results in awkward, inefficient floorplates, which, in turn, creates undersized apartments with acute angles and unusable spaces; and

WHEREAS, further, the applicant states that, above 85 feet, the required setbacks of ten feet at the East Houston Street façade and 15 feet at both the Avenue C and East Second Street façades, result in a building depth of 25 feet and apartments that are unmarketably long and narrow; and

WHEREAS, thus, the applicant asserts that a building with complying lot coverage yields apartments that are well below the market standard; and

WHEREAS, the applicant also contends that the site's irregular shape in combination with the prevailing soil conditions in the surrounding area—a tendency towards soil liquefaction up to 50 feet below the ground, which impairs the soil's bearing capacity—results in premium construction costs that are unique to the site; and

WHEREAS, in particular, the applicant's geotechnical consultant represents that due to the site's shallowness, substantial width, and substandard soil conditions, construction of a foundation will require grade and tie beams between the pile caps for structural stability; in addition, end bearing piles are required to extend through the liquefiable zone down to bedrock, which the consultant estimates to be at a depth of 90 to 100 feet; the applicant notes that such piles are more costly than typical piles; and

WHEREAS, the applicant states that in addition to its potential for liquefaction, the soil is highly-contaminated due to the site's more than 50 years of use as a gasoline service station, including a petroleum spill (New York State Department of Environmental Conservation ("DEC") Spill No. 90-01894), which is subject to a DEC Consent Order and a Remedial Action Plan; and

WHEREAS, the applicant attributes \$865,371 in premium construction costs due to the contaminated soil and estimates the total premium construction costs due to the unique characteristics of the site (irregular shape and contaminated soil) to be \$2,922,917; and

WHEREAS, the applicant asserts that there is a direct nexus between the unique shape of the site and the

requested lot coverage waiver, in that allowing full lot coverage alleviates the burden inherent in the site's trapezoidal shape; likewise, the proposed commercial use at the first story (with accessory storage in the cellar) will provide a higher return on investment than would conforming uses in the same space, and as such, will help defray the premium construction costs of developing a contaminated site; and

WHEREAS, based upon the above, the Board finds that the site's irregular shape and soil contamination create unnecessary hardships and practical difficulties in developing the site in compliance and conformance with the applicable zoning regulations; and

WHEREAS, the applicant contends that, per ZR § 72-21(b), there is no reasonable possibility of development of the site in compliance and conformance with the Zoning Resolution; and

WHEREAS, the applicant represents, as noted above, that the site's unique conditions create \$2,922,917 in premium construction costs; and

WHEREAS, the applicant considered the following four scenarios: (1) an as-of-right residential development with ten stories, 37,296 sq. ft. of floor area (6.35 FAR), and 53 dwelling units; (2) to further illustrate the hardships inherent in the site, an as-of-right development on a typical, rectangular site with 12 stories, 41,760 sq. ft. of floor area (7.20 FAR), and 51 dwelling units; (3) a lesser-variance scenario including only a waiver for lot coverage with ten stories, 41,826 sq. ft. of floor area (7.12 FAR), and 51 dwelling units; and (4) the proposal; and

WHEREAS, at hearing, the Board directed the applicant to: (1) align the land sales and development rights sales in time; (2) provide additional retail rent comparables; and (3) justify the capitalization rate used; and

WHEREAS, in response, the applicant provided an amended economic analysis, which supports its assertion that only the proposal would realize a reasonable rate of return on investment; and

WHEREAS, based upon its review of the applicant's economic analysis, the Board has determined that because of the subject lot's unique physical conditions, there is no reasonable possibility that development in compliance and conformance with applicable zoning requirements would provide a reasonable return; and

WHEREAS, the applicant represents that the proposed building 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, in accordance with ZR § 72-21(c); and

WHEREAS, the applicant states that the surrounding neighborhood is characterized by medium- and high-density residential buildings, with active ground floor commercial uses along Avenue C, heavy

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automobile traffic along East Houston Street; in addition, there are nearby parks (East River Park, El Jardin Del Paraiso Park, and Hamilton Fish Park) and playgrounds (Nathan Straus Playground and Baruch Playground) within walking distance of the site; and

WHEREAS, as to adjacent uses, the applicant states, as noted above, that the site is trapezoidal and bounded on three sides by streets, and on its west side by a multiple dwelling; and

WHEREAS, turning to bulk, the applicant states that, in addition to complying with the height and setback requirements of the subject R8A district, the proposed ten-story building is contextual with the built character and profile of buildings in the immediate vicinity; in support of this statement, the applicant provided a height study, which reflects that of the 19 buildings within 1,000 feet of the site with eight or more stories, 12 buildings have ten or more stories; and

WHEREAS, further, the applicant notes that the proposed lot coverage waiver allows the building to maintain an uninterrupted street wall, rather than the jagged setbacks that would be required for a complying building; and

WHEREAS, at hearing, the Board directed the applicant to revise its application to reflect the location of nearby parks and to indicate the effect, if any, of shadows upon such parks; and

WHEREAS, in response, the applicant provided an amended Environmental Assessment Statement (“EAS”), reflecting the requested shadow analysis; and

WHEREAS, as to the concerns articulated by Councilmember Mendez, the Opposition, and the Community Board, the Board observes that although the proposed building itself will not include affordable apartments, the building is being constructed via the purchase of bonus development rights through a qualified generating site pursuant to the Inclusionary Housing Program – as such, the site is contributing to the creation of affordable housing in New York City; and

WHEREAS, as to the proposed commercial use at the ground floor, the applicant contends and the Board agrees that commercial use is well-established at the site, in that a gasoline station (Use Group 16) has been operating on it for nearly six consecutive decades; thus, the Board finds that the proposed Use Group 6 commercial use reflects a significant reduction in the intensity of the non-residential use, particularly with respect to automobile traffic; and

WHEREAS, as to the lack of community facility use at the site, the Board observes that nothing in the Zoning Resolution mandates the inclusion of a community facility use at this site; further, the Board accepts the applicant’s economic analysis, which reflects that a commercial use is necessary to achieve a reasonable return; and

WHEREAS, as to the proposed height of the building, the Board notes that it complies with the subject R8A district regulations; and

WHEREAS, the Board reviewed the remaining concerns of the Opposition and found them without merit; and

WHEREAS, accordingly, the Board finds that this action 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 Board finds that, consistent with ZR § 72-21(d), the hardship herein was not created by the owner or a predecessor in title, but is due to the peculiarities of the site; and

WHEREAS, the Board also finds that this proposal is the minimum necessary to afford the owner relief, in accordance with ZR § 72-21(e); and

WHEREAS, 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 EAS CEQR No. 14-BSA-169M, dated January 8, 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, the site is subject to “E” designations for noise (E-216) under CEQR number 07DCP078M and hazardous materials (E-359) under CEQR number 14BSA169M; and

WHEREAS, the “E” designation requires an environmental review by the New York City Office of Environmental Remediation (“OER”), which must be satisfied before DOB will issue building permits for the property; 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; and

Therefore it is Resolved, that the Board of Standards and Appeals issues a Negative Declaration, with conditions as stipulated below, prepared in

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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 § 72-21 to permit, on a site within an R8A zoning district, the construction of a ten-story mixed residential and commercial building that does not comply with the zoning requirements for use and lot coverage, contrary to ZR §§ 22-10 and 23-145; *on condition* that any and all work will substantially conform to drawings as they apply to the objections above noted, filed with this application marked “Received January 30, 2015”–thirteen (13) sheets; and *on further condition*:

THAT the following will be the bulk parameters of the proposed building: a maximum of ten stories, a maximum floor area of 42,293 sq. ft. of floor area (7.20 FAR) (37,743 sq. ft. of residential floor area (6.43 FAR) and 4,550 sq. ft. of commercial floor area (0.77 FAR)), 100 percent lot coverage, 46 dwelling units, and a maximum building height of 105 feet, as reflected on the BSA-approved plans;

THAT an E designation (E-359) is placed on the subject site to ensure proper hazardous materials remediation;

THAT prior to the issuance by DOB of permits that involve any soil disturbance, the applicant shall receive approvals from OER for the hazardous materials remediation plan and construction-related health and safety plan;

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 January 30, 2019;

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 the plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, January 30, 2015.

A true copy of resolution adopted by the Board of Standards and Appeals, January 30, 2015.

Printed in Bulletin Nos. 5-6, Vol. 100.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

