

CORRECTION

This resolution adopted on January 14, 2014, under Calendar No. 360-65-BZ and printed in Volume 99, Bulletin Nos. 1-3, is hereby corrected to read as follows:

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APPLICANT – Greenberg Traurig, LLP by Jay A. Segal, Esq., for Dalton Schools, Inc., owner.

SUBJECT – Application July 19, 2013 – Amendment of previously approved Variance (§72-21) and Special Permit (§73-64) which allowed the enlargement of a school (*Dalton School*). Amendment seeks to allow a two-story addition to the school building, contrary to floor area (§24-11) and height, base height and front setback (§24-522, §24-522)(b)) regulations. R8B zoning district.

PREMISES AFFECTED – 108-114 East 89th Street, midblock between Park and Lexington Avenues, Block 1517, Lot 62, Borough of Manhattan.

COMMUNITY BOARD #8M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Hinkson and Commissioner Montanez....4

Absent: Commissioner Ottley-Brown.....1

Negative:.....0

THE RESOLUTION –

WHEREAS, this is an application for a reopening and an amendment to a previously-granted variance pursuant to ZR § 72-21 and special permit pursuant to ZR § 73-641 which authorized the enlargement of the Dalton School (“Dalton”) contrary to bulk regulations; and

WHEREAS, a public hearing was held on this application September 24, 2013, after due notice by publication in the *City Record*, with a continued hearing on October 29, 2013, and then to decision on January 14, 2014; and

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

WHEREAS, Community Board 8, Manhattan, recommends disapproval of this application; and

WHEREAS, certain members of the community provided testimony in support of the application; and

WHEREAS, a representative of the Board of Directors of 1095 Park Avenue provided testimony that included neither support nor opposition to the application; the representative did note Dalton’s cooperation and ongoing efforts to mitigate the expansion’s impact on 1095 Park Avenue; and

WHEREAS, representatives from Carnegie Hill Neighbors, the Board of Managers of 111 East 88th Street, the Board of Directors of 1105 Park Avenue, and certain members of the surrounding community provided testimony in opposition to the application (the

“Opposition”) citing the following concerns: (1) the effect of the expansion on neighboring properties with respect to natural light, ventilation, solar glare, shadows, noise, aesthetics, traffic during construction, and long-term property values; (2) the scale of the expansion in comparison to other mid-block, R8B buildings; (3) the fact that the site is already non-complying and has previously obtained bulk variances; (4) the absence of community outreach and Community Board support for the application; (5) the lack of an initial environmental assessment study (“EAS”) and the lack of time to review and respond to the EAS that was prepared; (6) the failure to address the (a), (c), and (e) findings of ZR § 72-21; (7) the misapplication of the Cornell doctrine for educational and religious institutions; (8) the precedent being set for other educational institutions within the mid-block contextual districts and citywide; and (9) the failure of Dalton to examine alternative sites and proposals; and

WHEREAS, the subject site is located mid-block on the south side of East 89th Street between Park Avenue and Lexington Avenue, in an R8B zoning district; and

WHEREAS, the site has 101.67 feet of frontage along East 89th Street and 10,235 sq. ft. of lot area; and

WHEREAS, the site is occupied by a 12-story building (“the Building”) used entirely for Dalton’s school purposes; and

WHEREAS, the Building, which was constructed in 1929 for Dalton, originally had ten stories with a small four-story portion at the rear; and

WHEREAS, in 1965, due to increased enrollment primarily from the inclusion of boys in the formerly all girls’ school, Dalton sought a variance and special permit, pursuant to the subject calendar number, to permit a single-story vertical extension of fenced-in areas on the roofs of the fourth story and tenth story; the enlargements constituted 10,720 sq. ft. of floor area, and increased the existing non-compliance related to FAR, front/rear setback, and sky exposure plane regulations under the then-R8 zoning; and

WHEREAS, the applicant states that the extension on the fourth-story roof was for an art studio, and the extension on the tenth-story roof created a double-height 11th story for a regulation-size gymnasium; and

WHEREAS, in the early 1990s, due to increased enrollment, Dalton sought additional classroom space; accordingly, on March 3, 1992, pursuant to the subject calendar number, Dalton obtained an amendment to the grant (the “Prior Amendment”) to allow the expansion within the Building’s envelope of the tenth-story library mezzanine and the insertion of a floor slab into the double-height gymnasium to convert the gymnasium into two new classroom floors (the 11th and 12th stories); the Prior Amendment allowed for 7,092 sq. ft. of additional floor area and required relief from FAR regulations under the current R8B zoning (also height and setback relief attributed to minor work on the cornice and roof); the construction permitted by the Prior Amendment was completed in 1995; and

WHEREAS, accordingly, the applicant states that in the nearly 85 years since the Building was

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constructed, its envelope has been expanded only once, in 1965, pursuant to the variance; and

WHEREAS, the Building exists now within its 1965 building envelope, with the floor area increase granted by the Prior Amendment for 86,796 sq. ft. (8.48 FAR), 12 floors, and a total height of 143'-10"; and

WHEREAS, the applicant proposes to construct a two-story 12,164 sq. ft. enlargement above the 12th floor which will result in 98,960.4 sq. ft. of floor area (9.67 FAR), 14 floors, and a total height of 170'-5"; a rooftop greenhouse will add 6'-5" of height at its peak (the "Enlargement"); and

WHEREAS, the underlying R8B zoning district regulations allow for a maximum of 52,219 sq. ft. (5.1 FAR), a base height of 60 feet, and total height of 75 feet; and

WHEREAS, the applicant notes that Dalton occupies four buildings: 108-114 East 89th Street (the Building) occupied by the Upper School, comprising the Middle School (grades four through eight) and the High School (grades nine through twelve), totaling 929 students; 51-63 East 91st Street - The Lower School, comprising the First Program (kindergarten through third grade), totaling 376 students; 200 East 87th Street - The Physical Education Center; and 120 East 89th Street - offices; and

WHEREAS, the applicant represents that Dalton's enrollment has increased by only 25 students since the Board approved the Prior Amendment, but the curriculum has evolved such that it is necessary for Dalton to provide additional classroom space in the Building; and

WHEREAS, the applicant represents that the programmatic need for the enlargement is to develop Dalton's "STEM" program for science, technology, engineering and mathematics education, which is at the center of nationwide initiatives to transform education, from the primary grades through graduate school, by reemphasizing the science-based fields; and

WHEREAS, the applicant represents that Dalton is currently unable to offer the programming, particularly in technology and engineering to satisfy the goals of a competitive STEM curriculum; and

WHEREAS, specifically, for example, Dalton states that only 30 high school students are enrolled in the robotics course, which combines elements of engineering and computer science; and

WHEREAS, the applicant asserts that the modest enrollment is attributed to the lack of a specialized engineering space which would allow students to construct and test projects during the school day; instead, such work now must take place after school or on Saturdays, which deters students who are on a team sport or play an instrument and have practices and games or other activities scheduled after school; and

WHEREAS, the applicant states that the need to construct and test robots after school causes additional difficulties; the robots are tested on a 12-ft. by 12-ft. robotics movement "field" where they perform their designed tasks; the applicant notes that because this

activity occurs after normal school hours in the computer science classroom, the first and last half hours of each after-school session is spent setting up and dismantling the movement field; and

WHEREAS, the applicant states that the Enlargement would allow for a permanent movement field and eliminate the wasted set-up and dismantling time; also, without a specialized engineering space, robots have to be stored on the floor in the computer science classroom which limits the size of the robots that can be constructed and curtails Dalton's participation in FIRST, a not-for-profit organization devoted to helping young people discover and develop a passion for STEM; and

WHEREAS, as to computer science, the applicant states that a basic computer science class requires a room with computer stations and a space for group work on problems; Dalton currently has one such combined room for its entire computer science program, thus it is occupied by classes during every available period and is used for Lab meetings during the other periods, such as lunch periods - Lab periods are especially critical in computer science classes due to the need for incremental adjustments to projects that require meetings between student and teacher with access to the equipment; and

WHEREAS, Dalton represents that in 2005, 43 of its high school students took computer science; in 2012, 203 of the 455 high school students signed up to take the course, but only 184 were able to be enrolled in 2013 due to space limitations; for 2014, 254 students have signed up and they expect even more students to sign up in the future; and

WHEREAS, the applicant states that with the complete utilization of Dalton's one computer science classroom, no additional students can take computer science, nor can Dalton offer any computer science classes to middle school students, or provide new computer science classes in a greater variety of subareas; and

WHEREAS, the applicant represents that to meet the demand for additional computer science classroom space, the Enlargement would have computer science classrooms adjacent to both the High School and Middle School Facilities; and

WHEREAS, additionally, Dalton cites to deficiencies in its science program with insufficient space for students to participate in long-term in-house research projects that can be performed in the Building; in 2013 only 12 of the 48 students who signed up to perform long-term in-house research projects could be so placed; the other 36 students could not perform experiments and had to limit their work to theory; and

WHEREAS, the applicant states that the proposed Enlargement would contain two specialized robotics and engineering facilities, each of which takes up the space of approximately three regular classrooms, a long-term science research lab (approximately the size of two-to-three regular classrooms), and a greenhouse (approximately the size of three regular classrooms) (collectively, the "New Facilities"), which Dalton needs

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in order to correct the deficiencies in its STEM program; and

WHEREAS, the applicant submitted a matrix that shows the occupancy of each regular classroom, for each period, in each day of a typical school week during the most recent school year to support its point that the Building's existing classrooms are fully utilized and there is no classroom space in the Building for new courses or additional sections of existing courses; thus, the Building's classroom space cannot be converted into the New Facilities; and

WHEREAS, the matrix reflects that regular classrooms are occupied during 74.88 percent of the periods in a school week, but notes that in the periods in which these classrooms are not being used for a class, students who would otherwise use these rooms are at lunch, gym or assembly, so that when accounting for these periods, the adjusted weekly-utilization rate for regular classrooms is 89.83 percent; and

WHEREAS, the applicant represents that during the approximately 10 percent of periods when the rooms could be used by classes, they are usually occupied by teachers and students engaged in Lab meetings, either because access to materials in the classroom is needed, or because there is insufficient faculty office space for these meetings to occur elsewhere; and

WHEREAS, the applicant represents that the nearly 90 percent adjusted-utilization rate of Dalton's regular classrooms is very high and it would be difficult to increase the rate because it would be very hard to match the scattered room availability with both student and teacher availability; and

WHEREAS, the applicant also states that there is not any other non-classroom space that can be converted for the STEM use and there is not any space in Dalton's other buildings available for the STEM use; and

WHEREAS, the applicant notes the following specific use of the Enlargement: two stories with approximately 12,164 sq. ft. of floor area; the 13th floor, containing approximately 6,100 sq. ft. of floor area, would have an approximately 480 sq. ft. machine room (the "Machine Room"), an approximately 1,200 sq. ft. high school robotics/engineering laboratory (the "High School Engineering Lab," and together with the Machine Room, collectively, the "High School Facility"), an approximately 420 sq. ft. high school computer science classroom, an approximately 950 sq. ft. middle school robotics/engineering lab (the "Middle School Facility") and an approximately 500 sq. ft. middle school computer science classroom; the 14th floor, also approximately 6,100 sq. ft., would contain an approximately 1,300 sq. ft. greenhouse, an approximately 1,200 sq. ft. science research lab, and three classrooms, each approximately 460 sq. ft.; and

WHEREAS, the applicant states that the High School Facility would include fabrication laboratory equipment (the "Fab Lab"), prototyping (assembly)

space, a robotics area, engineering equipment, and a machine room; and

WHEREAS, the applicant states that the High School Facility will allow Dalton to meet the following primary goals: allow 85 to 110 high school students to take robotics if both the lecture and construction components of the course were provided during the school day, rather than after school and on weekends; allow students to enter competitions with the space to construct larger projects such as solar cars and gravity vehicles; to offer a variety of engineering electives, such as biological and electrical engineering, which require such a facility to construct and test projects; to offer, as an accredited course, participation in the Science Olympiad, a citywide competition combining engineering and science; and to integrate art into its STEM program by offering new courses such as Computer Science and Art (Graphics) which need to utilize the specialized Fab Lab equipment; and

WHEREAS, additionally, the new facility will allow middle school students access to robotics and engineering classes, including the Fab Lab; sufficient space to undertake long-term research projects; new science electives such as Quantum Mechanics, Advanced Environmental Science, Evolutionary Ecology, Astronomy II, Electronics, and Marine Biology that require lab projects; and

WHEREAS, finally, the Enlargement will include a greenhouse to be used for (1) Dalton's Environmental Science class for food and agricultural studies and experiments with nutrient recycling and energy conservation, (2) biology classes, for studies on plant function and growth, (3) other classes that have units on plants or sunlight, and (4) Middle School and High School environmental clubs; and

WHEREAS, the applicant represents that the proposal will further Dalton's programmatic needs without affecting any of the findings of the original variance grant; and

WHEREAS, the applicant further represents that the proposed facility is unable to be accommodated within Daltons other buildings: specifically (1) in 200 East 87th street where Dalton leases the lowest five floors, an enlargement is infeasible as the floors above are occupied by co-op apartments; (2) in 120 East 89th street where Dalton leases office space, the lease expires in 2020, and any additional space would be in doubt at the time the lease expires; and (3) expansion space off-site would not meet the programmatic needs because travelling to off-site location diminishes class time; and

WHEREAS, , the applicant states that the New York State Court of Appeals has held that in a residential district educational institutions cannot be required to show an affirmative need to expand as a condition precedent to the issuance of a discretionary approval by a zoning board. *See, e.g., Cornell University v. Bagnardi*, 68 N.Y.2d 583 (1986); *Lawrence School Corp. v. Lewis*, 578 N.Y.S.2d 627 (N.Y.A.D. 2 Dept., 1992); and

WHEREAS, the applicant adds that the Cornell court also held that because "schools, public, parochial,

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and private, by their very nature, singularly serve the public's welfare and morals," zoning boards in New York should allow schools to expand into residential areas unless a particular proposed expansion "would unarguably be contrary to the public's health, safety or welfare." *Id.* at 593, 595; and

WHEREAS, the applicant asserts that Cornell crystallized the Court of Appeals' long-standing presumption in favor of educational and religious uses in residential areas. See Diocese of Rochester v. Planning Bd. of Town of Brighton, 1 N.Y.2d 508, 526 (1956) ("schools and accessory uses are, in themselves, clearly in furtherance of the public morals and general welfare"); and

WHEREAS, further, the applicant asserts that under the State's standard, the court has held that, for example, the potential adverse impacts on "use, enjoyment and value of properties in the surrounding areas" and on "the prevailing character of the neighborhood" are "insufficient bas[e]s on which to preclude" the substantial expansion of a religious facility in a residential neighborhood. Westchester Reform Temple v. Brown, 22 N.Y.2d 488, 494 (1968); and

WHEREAS, the applicant asserts that the proposed variance would allow Dalton to add 12,164 sq. ft. of instructional and research space in two additional floors at the top of the Building; the Enlargement will not lead to an increase in enrollment, nor will it result in additional traffic in the area; the principal affect will be on the eastern views of apartments on the top floors of 1095 Park Avenue, the building to the immediate west; and

WHEREAS, the applicant states that the Building's configuration constitutes a unique physical condition on the zoning lot, which causes Dalton practical difficulties and unnecessary hardship that prevent Dalton from being able to carry out its proposed program in the Building, particularly in the STEM areas; and

WHEREAS, the applicant notes that construction of the Enlargement would increase the Building's non-compliance with, and requires relief from, the applicable maximum base height, maximum building height, front setback, rear setback, and FAR requirements of the Zoning Resolution, but that strict application of the Zoning Resolution would serve no public purpose and would operate as a severe constraint on Dalton's functioning as an academic institution; and

WHEREAS, the applicant asserts that its hardship is not one that is generally applicable to uses located in the neighborhood in which the zoning lot is located, which is predominately residential in nature; and

WHEREAS, specifically, the applicant notes that there is only one other school within 400 feet of the site, PS M169 (Robert F. Kennedy School), directly south of the site, at 110 East 88th Street, which occupies the lower floors of a 38-story residential tower; and

WHEREAS, the applicant asserts that the proposed Enlargement would not be contrary to the public's health, safety or welfare and that it would not alter the essential visual character of the neighborhood; and

WHEREAS, the applicant asserts that because the Enlargement is designed to serve the existing school enrollment, there will be no resulting increase in the use of the Building, and thus no increase in pedestrian or vehicular traffic in the area; and

WHEREAS, as to bulk, the applicant notes that increasing the stories in the Building from 12 to 14 would raise its height by 26'-7" to 170'-5"; and

WHEREAS, the applicant submitted an area map and a table which identify other buildings with comparable heights within a 400-ft. radius of the site; and

WHEREAS, the analysis reflects that of the 152 buildings shown, from 85th Street to 91st Street between Lexington and Madison avenues, there are 45 buildings with more than 13 stories, including two on the Building's block- the property immediately to the west of the Building, 1095 Park Avenue, which has 18 stories and extends approximately 50 feet into the R8B district, and the building on the southeast corner of the Building's block, 1085 Park Avenue, which is 15 stories; there are also five buildings with more than ten stories, and nine with more than seven stories; and

WHEREAS, the applicant asserts that the development of adjacent property will not be substantially impaired should the amendment be granted because the principal impact of the Enlargement will be on the eastern views from and light and air to the windows on the upper stories of 1095 Park Avenue, the building immediately to the west; and

WHEREAS, the applicant notes that 1095 Park Avenue is an 18-story building, with its zoning lot having 159 feet of frontage on East 89th Street, the western 100 feet are in an R10 district, and the remaining 59 feet, including the portion in which the affected windows are located, are in the same R8B district as the Building; and

WHEREAS, the applicant notes that the Enlargement and the elevator bulkhead would be between 9'-0" and 14'-10" from the affected windows in 1095 Park Avenue and the acoustic screen on the roof of the Enlargement would be approximately 25 feet away from the affected windows; and

WHEREAS, the applicant notes that the Enlargement, the elevator bulkhead, and the presence of the screen would adversely affect the views from and light and air to windows on the 15th through 18th floors, and would obstruct the light and air to some windows on the 14th floor of 1095 Park Avenue; and

WHEREAS, however, the applicant asserts that under the relevant legal standards the obstruction of the views from and light and air to the affected windows should not be considered contrary to the public's health, safety or welfare; and

WHEREAS, the applicant notes that the Enlargement will also be visible from 13 other

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comparably-sized buildings; and WHEREAS, the applicant notes that the Enlargement will be fully enclosed and no student access will be permitted on the roof; therefore, there will be no affect with respect to noise from the Enlargement on adjacent properties; and

WHEREAS, the applicant asserts that the Enlargement will contain aspects that will contribute positively to the neighborhood, aesthetically and environmentally including an attractive brick façade to replace the current stucco-facing of the 11th and 12th floors, to match the façade of the Enlargement and the rest of the Building; and

WHEREAS, at the Board's request, the applicant identified all of its mitigation measures for sound and other potential impacts to surrounding buildings; such measures include: (1) replacement of stucco with brick on the existing top two stories, (2) the ductwork on the south-facing existing wall of the Building will remain, but the extension of the ductwork for the two new stories will be brought into the Building, (3) installation of more efficient mechanical equipment and acoustic screens for noise reduction, (4) elimination of west-facing windows on the enlargement in response to 1095 Park Avenue's concerns, (5) lighting controls within the building to turn off lights when unoccupied and use of the greenhouse grow lights only during daylight hours, (6) elimination of the western stair bulkhead and water tower and reduction in height of the elevator bulkhead from 15 feet to 13 feet, (7) prohibition of the use of the roof by children, and (8) the provision of green roof and plantings on vertical surfaces visible from 1095 Park Avenue; and

WHEREAS, the applicant states that in granting the Prior Amendment, the Board made the required findings under ZR §§ 72-21, 73-03, 73-64 and 73-641 of the Zoning Resolution and that the proposed amendment does not disturb any of the prior findings; and

WHEREAS, the Opposition asserts that the application should have been filed as a new variance application instead of as an amendment to the Special Order Calendar, and it cites Westwater v. New York City Bd. of Stds. and Appeals, 2013 N.Y.Misc Lexis 4707 (1st Dept 2013) and Fisher v. New York City Bd. of Stds. and Appeals, 71 AD2d 126, 127 (1st Dept 2002) for the principle that only site changes that would be permitted as-of-right but for the prior variance—"minor" or "ministerial" changes—are properly reviewed as amendments to a variance; all other changes, the Opposition states, must be reviewed as new variance applications; as such, the Opposition states that the proposal, which would not be permitted as-of-right, was improperly filed as an amendment; and

WHEREAS, additionally, the Opposition asserts that the EAS is deficient in the following respects: (1) it fails to acknowledge that the expansion results in a building that is more similar to the adjacent R10 district than to Dalton's mid-block R8B district; (2) the shadow study addressed the incremental impact of the

expansion rather than the impact of the Building as a whole; (3) the urban design analysis erroneously compared Dalton to Park Avenue buildings rather than buildings within the mid-block R8B; (4) the air quality study did not include the effects of the expansion on buildings other than 1095 Park Avenue; (5) the construction impacts discussion ignores the fact that work will have to be performed outside of school hours; (6) the EAS does not address that this is the third variance application filed at the site; and (7) the Opposition also takes exception with the timing of the submission of the EAS, and states that it is contrary to SEQRA's goal of incorporating environmental considerations into the decision making process at the earliest opportunity; and

WHEREAS, finally, the Opposition asserts that the application ignores the requirements of ZR § 72-21(a), (c), and (e) in that: (1) the application does not articulate a unique physical condition inherent on the zoning lot that creates a practical difficulty in developing in accordance with the zoning regulations; (2) the application does not demonstrate how the expansion outweighs the detrimental impact on the general welfare of the surrounding community; and (3) the application includes no alternative development proposals and provides no details of the use of the building that would enable to Board to make a finding that the proposal is the minimum variance necessary; and

WHEREAS, the applicant responded to the following primary concerns raised by the Opposition (1) the assertions about the requirement for, substance of, and procedure of the EAS; (2) the incompatibility of the Enlargement with the character of the neighborhood; (3) the scope of the Enlargement and its nature as a third approval for the Building; and (4) the limitations of the case law deference afforded to educational institutions; and

WHEREAS, as to the Opposition's concerns about the form of the application and the requirement for an EAS, the applicant notes that such claims are rendered moot by its submission of an EAS; and

WHEREAS, specifically, the applicant notes that it submitted an EAS in a manner which afforded the Opposition and the Community Board in excess of 70 days to review and respond; and

WHEREAS, the applicant asserts that the Community Board has been afforded more time to review the EAS than if it had been submitted with the initial application because if the EAS had been submitted along with the initial application, it is unlikely that the Community Board would have had the opportunity to review critiques of the EAS as provided by the Opposition's consultants and likely that it would not have had more than 60 days to review; and

WHEREAS, the applicant notes that the Opposition reviewed and submitted a lengthy response to the EAS for the Board's consideration; and

WHEREAS, as to the Opposition's concerns related to alleged deficiencies in the EAS, the applicant asserts that they are without merit and that the EAS was

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conducted in full accordance with the methodologies set forth in the City’s CEQR Technical Manual; and

WHEREAS, the applicant notes that it submitted the EAS to the Community Board more than 60 days prior to the Board’s scheduled decision date, which is consistent with the 60-day period that the Community Board has to review new applications prior to the Board’s first hearing; and

WHEREAS, as to the Opposition’s concerns about the EAS being submitted after the application had already been initially reviewed, the applicant notes that those concerns were raised prior to the revision of the submission schedule which allowed the Community Board and the Opposition more than 60 days to review and comment on the EAS; and

WHEREAS, as to the Opposition’s concerns about the Land Use, Public Policy and Zoning Section of the EAS, the applicant notes that the Opposition’s consultant concedes that the EAS “examines direct impacts” of the variance, but contends that it “ignores the possibility of indirect impacts” such as the potential that a variance granted for this project may lead to similar variances for other facilities in the R8B district; and

WHEREAS, the applicant notes that the CEQR Technical Manual requires a study of indirect impacts of an action only when a site-specific change “is important enough to lead to changes in land use patterns over a wider area” but does not require a study of indirect impacts that are speculative; and

WHEREAS, the applicant notes that as to the Opposition’s concerns about the character of the R8B zoning in the mid-block, 11 other buildings in the midblocks between Park and Lexington avenues and East 87th Street and the north side of East 90th Street exceed the 75-ft. height limit of the R8B zoning district, with seven of them having heights of 150 feet or greater; and

WHEREAS, accordingly, the applicant asserts that the proposed Enlargement, which would increase the height of the Building from 143’-10” to 170’-5”, would not be out of context with the midblocks in its vicinity; and

WHEREAS, in response to the Opposition’s concerns regarding outreach, and questions raised by the Board, the applicant described its prior outreach to the community, including the neighbors at 1095 Park Avenue and performed additional outreach including displaying a model of the Building to 1105 Park Avenue; and

WHEREAS, as to the specific impact alleged by 1105 Park Avenue that the Enlargement would have a significant adverse effect on views from 1105 Park Avenue’s south and east facing windows and would cast shadows on its façade, the applicant asserts that the Enlargement would only be visible from these windows at oblique angles at distances ranging from 80 to 160 feet (based on distances shown on the Sanborn Map); and

WHEREAS, as to the Opposition’s claims that the

applicant failed to provide an analysis of alternative sites, the applicant states that, following Cornell, such a discussion would be inappropriate; the court stated that “[a] requirement of a showing of need to expand, or even more stringently, a need to expand to the particular location chosen, however, has no bearing whatsoever upon the public’s health, safety, welfare or morals. The imposition of such a requirement, or any other requirement unrelated to the public’s health, safety or welfare, is, therefore, beyond the scope of the municipality’s police power, and thus, impermissible” Cornell at 597 (citations omitted); and

WHEREAS, first, as to procedure, the Board notes that (1) New York State courts have recognized the Board’s authority to establish which hearing calendar and application type is appropriate for proposals under its consideration; (2) the content of the application and the Board’s analysis, rather than the calendar designation, guide the Board’s review; (3) although the application was filed on the Special Order Calendar, the applicant satisfied the requirements of a variance application including specifically notification of neighbors and the submission of an EAS; and (4) the Board reviewed the application with the same degree of rigor it would had it been a new variance application; and

WHEREAS, the Board agrees with the applicant that the Opposition’s case law cited in support of the timing concern is not persuasive as one case holds that environmental review must occur prior to the action by the governmental body, which is consistent with the Board’s review here prior to acting on the subject application See City Council of City of Watervilet v. Town Board of Colonie, 3 N.Y. 3d 508 (2004); and

WHEREAS, as to the Opposition’s assertion that the EAS should have examined the cumulative impacts of the subject application along with Dalton’s two prior grants, which were granted 22 and 49 years ago, respectively, the Board agrees with the applicant that there is not any support for this contention in the CEQR Technical Manual or in Save the Pine Bush v. Albany, 70 N.Y. 2d 193, 206 (1987), which pertains to ten proposed projects in a recently rezoned area, and not to the cumulative impact of three actions to a single property over 49 years; and

WHEREAS, the Board notes that its Rules of Practice and Procedure do not require that an EAS be submitted for applications on the Special Order Calendar, but that the applicant volunteered to prepare an EAS to respond to concerns the Opposition raised and that it followed the requirements of the CEQR Technical Manual; and

WHEREAS, the Board notes that the applicant submitted the EAS to the Opposition and the Community Board more than 70 days in advance of the Board’s decision, which is more time than the Community Board has in a standard application process; and

WHEREAS, the Board has considered the relevant findings and concludes that the proposal does

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not disturb any of the findings of the original variance or special permit; and

WHEREAS, the Board accepts the programmatic needs as legitimate and finds that the applicant has sufficiently described the specific needs for the proposed new floors and articulated a clear need for all of the proposed floor area; and

WHEREAS, the Board accepts the applicant's representations that the proposed space is necessary to accommodate the STEM programming, allow more students to participate in the programming, and to relieve the nearly 90 percent utility of the existing classrooms which constrains school-wide scheduling; and

WHEREAS, the Board notes that the streetwall, height and setback waivers are necessary so that the Building may follow the institutional model of uniform floor plates to promote efficiencies and have floor to floor heights that are appropriate for classroom and laboratory use and can accommodate building services; and

WHEREAS, the Board also agrees with the applicant that Cornell does not allow for a zoning board to require an educational institution to analyze alternate sites and finds that the applicant has sufficiently satisfied its minimum requirements to accommodate its programmatic needs; and

WHEREAS, as to the compatibility of the proposed use and bulk, the Board notes that the applicant does not propose to increase enrollment and, thus, the current use will be maintained; and

WHEREAS, the Board finds that the amendments including the additional 12,164 sq. ft. and the additional two stories and 27 feet in height will still allow the subject building to meet the (c) finding; and

WHEREAS, the Board notes that the original ten-story building did not comply with the floor area or sky exposure plane at the sixth floor when the R8 zoning district regulations were imposed in 1961; and

WHEREAS, accordingly, as of 1961, before any Board action, there was not any as-of-right enlargement available to the pre-existing non-complying Building, which was originally constructed to a height in excess of 119'-3" and 6.5 FAR; and

WHEREAS, since its construction in 1929, the building also has never had a height of FAR that would comply with the 75-ft. of 5.1 community facility FAR R8B regulations which has been in effect since the 1985 rezoning of the mid-block; and

WHEREAS, the Board does not find that it is appropriate to measure any enlargement to the Building against the R8B building envelope since the current non-complying building envelope has existed since 1965; thus, the true incremental increase is from the existing 1965 building envelope with height of 143'-10" (the envelope was built to accommodate 7.7 FAR, which was increased to the existing 8.48 FAR); and

WHEREAS, the Board notes that if the Building's existing non-complying conditions established in 1965 are used as a base line, rather than the R8B envelope,

the height increment is 27 feet versus 95 feet and thus a much more reasonable change than the Opposition suggests; and

WHEREAS, the Board notes that 1095 Park Avenue, which is adjacent to the school building, extends approximately 50 feet into the subject R8B midblock and has an even greater degree of non-compliance with a height of 192 feet; and

WHEREAS, as a result, on the south side of the midblock where the subject site is located, the adjacent 1095 Park Avenue and the Building create a built condition with an existing non-compliance to FAR and height that extends 150 feet into the 200-ft. length of the East 89th Street midblock; and

WHEREAS, the Board further notes that the surrounding midblocks, particularly to the south (between East 85th and 88th streets between Lexington and Park avenues) and to the west (between East 88th and East 89th streets between Park and Madison avenues) are zoned for 10.0 FAR (R10 equivalent) and allow building heights of 185 feet under the contextual envelope; and

WHEREAS, the Board finds that because of the existing and surrounding context, which is more similar to an R10 equivalent context than R8B, the proposed total 9.67 FAR and 170-ft. height are appropriate; and

WHEREAS, as to the Opposition's concerns that the Enlargement will have a negative impact on surrounding buildings, the Board notes that the direct impact is on 1095 Park Avenue and that Dalton has worked with its neighbor to resolve concerns and to provide mitigation measures to lessen impact, to the extent that its Board of Directors did not oppose the project; and

WHEREAS, the Board notes that the affected windows at 1095 Park Avenue are themselves above the maximum building height of 75 feet in the R8B district as 1095 Park Avenue has 18 stories and, further that, 1105 Park Avenue has 15 stories with an oblique view of the Enlargement; and

WHEREAS, the Board agrees with the applicant that under the relevant legal standards, the obstruction of the views from the 1095 Park Avenue windows is not a sufficient justification for denying the subject application; and

WHEREAS, as to the question of whether the proposal represents the minimum variance, the Board reiterates that the applicant has established that the request for the Enlargement is required by Dalton's legitimate programmatic needs; and

WHEREAS, the Board while recognizing the legitimate concerns raised by the Opposition regarding the degree of waivers requested for the proposed action, does not believe that the approval of such action will set a precedent for future variance applications in the midblock; and

WHEREAS, specifically, the Board reviews each case based on its unique factors and context in determining the appropriateness of floor area and height and setback waivers as well as the neighborhood character finding; and

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WHEREAS, the Board finds that the proposed Enlargement, given certain unique factors and context cited above, would not change the essential character of the neighborhood: and

WHEREAS, the Board notes that the applicant represents that Dalton does not have plans to enlarge the Building again in the future, and the Board is concerned that any future enlargement may exceed an appropriate building height and floor area for the neighborhood and may disturb the variance findings; and

WHEREAS, the Board notes that the applicant states that Dalton does not plan to increase its enrollment; thus, the Board finds that the Building with the proposed Enlargement will relieve the high demand for classroom space and allow flexibility in the future to accommodate new programmatic needs as they arise such that additional enlargements would not be warranted; and

WHEREAS, based upon the above, the Board has determined that the evidence in the record supports a grant of the requested amendment with the conditions listed below.

Therefore it is Resolved, that the Board of Standards and Appeals reopens and amends the resolution, dated June 8, 1965, to grant the noted modifications to the previous approval; *on condition* that all work shall substantially conform to drawings as they apply to the objections above-noted, filed with this application and marked 'Received October 9, 2013'-(10) sheets; and *on further condition:*

THAT the following will be the bulk parameters of the enlarged Building: a maximum of 14 stories, a height of 170'-5", and 98,960 sq. ft. of floor area (9.67 FAR), as reflected on the BSA-approved plans;

THAT all proposed mitigation measures, including (1) replacement of stucco with brick on the existing top two stories, (2) installation of the ductwork extension for the Enlargement within the Building, (3) installation of more efficient mechanical equipment and acoustic screens for noise reduction, (4) elimination of west-facing windows on the enlargement, (5) installation of lighting controls within the building to turn off lights when unoccupied and use of the greenhouse grow lights only during daylight hours, (6) elimination of the western stair bulkhead and water tower and reduction in height of the elevator bulkhead from 15 feet to 13 feet, (7) prohibition of the use of the roof by children, and (8) the provision of green roof and plantings on vertical surfaces visible from 1095 Park Avenue will be installed and maintained in accordance with the BSA-approved plans;

THAT any change in the use or operator of the Building is subject to Board approval;

THAT this approval is limited to the relief granted

by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s);

THAT the approved plans will be considered approved only for the portions related to the specific relief granted; and

THAT the Department of Buildings 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) and/or configuration(s) not related to the relief granted."

Adopted by the Board of Standards and Appeals, January 14, 2014.

The resolution has been amended. Corrected in Bulletin Nos. 4-5, Vo. 99, dated February 5, 2014.

A true copy of resolution adopted by the Board of Standards and Appeals, January 14, 2014.

Printed in Bulletin Nos. 1-3, Vol. 99.

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.

