33-14-A
APPLICANT – Rothkrug Rothkrug & Spector LLP, for Quentin Road Development LLC, owner.
SUBJECT – Application February 13, 2014 – Appeal challenging the Department of Building's determination regarded permitted community facility FAR, per §113-11 (Special Bulk Regulations for Community Facilities) C4-2 zoning district, C8-2 (OP). C4-2 (OP) zoning district.
PREMISES AFFECTED – 902 Quentin Road, Southeast corner of intersection of Quentin Road and East 9th Street. Block 6666, Lot 1, Borough of Brooklyn.
COMMUNITY BOARD #15BK
ACTION OF THE BOARD – Appeal Denied.
THE VOTE TO GRANT –
Affirmative: 0
Negative: Chair Srinivasan, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez...4
Absent: Vice Chair Collins.....1
THE RESOLUTION –

WHEREAS, the subject appeal comes before the Board in response to a Final Determination, dated January 14, 2014, by the Department of Buildings ("DOB") (the "Final Determination"), with respect to DOB Application No. 302205940; and

WHEREAS, the Final Determination states, in pertinent part:

> Demonstrate compliance with ZR 113-00 for the Special Ocean Parkway District, including but not limited to ". . . portions of the building containing community facility uses shall be subject to the applicable underlying district bulk regulations of Article II, Chapter 3 (Bulk Regulations for Residential Buildings is Residence District) . . . ."; and

WHEREAS, a public hearing was held on this appeal on April 8, 2014, after due notice by publication in *The City Record*, with a continued hearing on May 20, 2014, and then to decision on June 24, 2014; and

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

WHERAS, the appeal is filed on behalf of the property owner who contends that DOB's denial was erroneous (the "Appellant"); and

WHEREAS, DOB and the Appellant have been represented by counsel throughout this appeal; and

WHEREAS, the subject site is located at the southeast corner of the intersection of Quentin Road and East Ninth Street, partially within a C8-2 zoning district and partially within a C4-2 zoning district, within the Special Ocean Parkway District; and

WHEREAS, the site, which comprises Tax Lots 1 and 5, has approximately 131 feet of frontage along Quentin Road, 111 feet of frontage along East Ninth Street, and 13,836 sq. ft. of lot area; and

WHEREAS, the Appellant states that 12,956 sq. ft. of lot area is within the C8-2 portion of the site and 880 sq. ft. of lot area (the southernmost 11'-0" by 80'-0" rectangle) is within the C4-2 portion of the site; and

WHEREAS, the site is occupied by an eight-story mixed community facility (Use Group 4) and commercial building (Use Group 6) with approximately 60,959 sq. ft. of floor area (4.4 FAR) (approximately 45,737 sq. ft. of community facility floor area (3.3 FAR) and approximately 15,222 sq. ft. of commercial floor area (1.1 FAR)) and 98 accessory parking spaces; and

PROCEDURAL HISTORY

WHEREAS, the Appellant states that on or about November 16, 2006, DOB issued an approval to construct the building under New Building Application No. 302205940 (the "Application"); the applicant states that it obtained permits to construct the building on or about August 18, 2009, and that DOB issued the first of several temporary certificates of occupancy for the building on or about November 28, 2012; and

WHEREAS, the Appellant states that during the course of construction, DOB audited the Application and determined that the proposed community facility floor area was in excess of that permitted under the Special Ocean Parkway District regulations; and

WHEREAS, specifically, the Appellant states that by determination dated October 26, 2012, DOB found that, per ZR § 113-11, the maximum permitted community facility floor area for the C4-2 portion of the site was approximately 686 sq. ft. (0.78 FAR) rather than 4,224 sq. ft. (4.8 FAR), because the C4-2 portion of the site (the 11'-0" by 80'-0" rectangle described above) was limited to the maximum permitted FAR of Article II, Chapter 3 (0.78 FAR) rather than the maximum permitted community facility FAR for a C4-2 zoning district outside the Special Ocean Parkway District (4.8 FAR); and

WHEREAS, subsequently, the Appellant obtained the Final Determination on January 14, 2014 and timely filed this appeal; and

WHEREAS, accordingly, the question on appeal is limited to the determination of the maximum permitted community facility FAR in a C4-2 zoning district within the Special Ocean Parkway District; and

WHEREAS, the Appellant asserts that it is 4.8 FAR; DOB asserts that it is 0.78 FAR; both parties claim support for their position in the text of ZR § 113-11 and its legislative history, as well as the structure of the Zoning Resolution overall; and

WHEREAS, by letter dated June 6, 2014, the Department of City Planning ("DCP") states that it supports DOB's position with respect to ZR § 113-11; and

PROVISIONS OF THE ZONING RESOLUTION

WHEREAS, the primary Zoning Resolution provisions the Appellant and DOB cite are as follows, in pertinent part:

> ZR § 23-142
> In R6, R7, R8 or R9 Districts
> R6 R7 R8 R9
> In the districts indicated, the minimum required #open space ratio# and the maximum #floor area ratio# for any #zoning lot# shall be as set forth in the following table for #zoning lots# with the #height factor# indicated in the table.

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MINIMUM REQUIRED OPEN SPACE RATIO
AND MAXIMUM FLOOR AREA RATIO
R6 through R9 Districts
In R6
Districts …

For #zoning lots# with a #height factor# of	…	Max. #floor area ratio#	…
1	…	.78	…

* * *

ZR § 34-112
Residential Bulk Regulations in other C1 or C2 Districts or in C3, C4, C5 or C6 District
C1-6 C1-7 C1-8 C1-9 C2-6 C2-7 C2-8 C3 C4 C5 C6
In the districts indicated, the applicable #bulk# regulations are the #bulk# regulations for the #Residence Districts# set forth in the following table:

Districts	Applicable #Residential District#
C3	R3-2
C4-1	R5
C4-2 C4-3 C6-1A	R6
…	…

* * *

ZR § 113-11
Special Bulk Regulations for Community Facilities
All #community facility buildings#, and portions of #buildings# containing #community facility uses#, shall be subject to the applicable underlying district #bulk# regulations of Article II, Chapter 3 (Bulk Regulations for Residential Buildings in Residence Districts), except as provided below:

(a) in R2X Districts, the #residential bulk# regulations of an R3-1 District shall apply to #community facility buildings#;
(b) in R6 or R7 Districts with a letter suffix, the applicable #bulk# regulations set forth in Article II, Chapter 4 (Bulk Regulations for Community Facility Buildings in Residence Districts) shall apply;
(c) in the Subdistrict, the #bulk# regulations of Article II, Chapter 3 shall apply, except as set forth in Section 113-503 (Special bulk regulations); and
(d) in R6 or R7 Districts without a letter suffix, the #community facility bulk# regulations of Article II, Chapter 4, may be made applicable by certification of the City Planning Commission, pursuant to Section 113-41 (Certification for Community Facility Uses on Certain Corner Lots); and

DISCUSSION

A. THE APPELLANT'S POSITION

WHEREAS, the Appellant asserts that the Final Determination is: (1) contrary to the clear, unambiguous language of ZR § 113-11; and (2) inconsistent with the intent of the Special Ocean Parkway District; and

WHEREAS, the Appellant states that the Final Determination is contrary to the clear, unambiguous language of ZR § 113-11; and

WHEREAS, the Appellant observes that where ZR § 113-11 employs the term "underlying" ([a]ll community facility buildings, and portions of buildings containing community facility uses, shall be subject to the applicable underlying district bulk regulations of Article II, Chapter 3 . . .") it does so in direct reference to Article II, Chapter 3; therefore, the Appellant asserts that to the extent that Article II, Chapter 3 supplies an "underlying" regulation, such regulation is applicable; and

WHEREAS, however, the Appellant states that there are no "underlying" district bulk regulations in Article II, Chapter 3 for a C4-2 district and that there are only "underlying" district bulk regulations in Article II, Chapter 3 in residence districts and commercial districts mapped within residential district (C1 and C2 districts); and

WHEREAS, the Appellant also states that ZR § 113-11 uses the term "applicable" as a modifier of "underlying," where use of the term "underlying" would have been sufficient to direct a reader of the section to Article II, Chapter 3; instead, by also using "applicable" the drafters signaled a clear intent to exclude from the Article II, Chapter 3 bulk regulations buildings or portions thereof within districts where there was no *applicable* underlying regulation, which the Appellant states is the case here; and

WHEREAS, thus, the Appellant states that because ZR § 113-11 clearly and unambiguously requires compliance with bulk regulations applicable for a community facility building under Article II, Chapter 3, and there are no such regulations in a C4-2 zoning district, the bulk regulations generally applicable to a community facility in a C4-2 zoning district govern (ZR § 33-123) and provide for a maximum community facility FAR of 4.8 FAR within the C4-2 portion of the site; and

WHEREAS, the Appellant also notes that DOB applied the same principle—that ZR § 33-123 controls where Article II, Chapter 3 has no applicable provision—to determine that the maximum permitted community facility FAR in the C8-2 portion of the site is 4.8 FAR; and

WHEREAS, the Appellant disagrees that the applicable underlying district bulk regulations for a C4-2 district are determined by reference to ZR § 34-112; and

WHEREAS, the Appellant states that nothing in the text of ZR § 113-11 supports reference to ZR § 34-112 and that DOB arbitrarily incorporated that section's provisions despite ZR § 113-11's clear reference to Article II, Chapter 3; and

WHEREAS, further, the Appellant asserts that ZR § 34-112 concerns residential district equivalents to commercial districts rather than "underlying" districts, which is a term that refers to an area where a commercial district is mapped within a residence district; and

WHEREAS, the Appellant also notes that the 2011 Key Terms Amendment to the Zoning Resolution which was intended to clarify ambiguous provisions and bring the text into alignment with long-standing DOB practices and interpretations, altered ZR § 113-11 in many respects but did not alter it to include reference to ZR §34-112; as such, the Appellant asserts that DOB erroneously incorporates ZR § 34-112 in determining the requirements of ZR § 113-11; and

WHEREAS, the Appellant contends that the Final Determination is contrary to the intent of the Special Ocean Parkway District; and

WHEREAS, the Appellant states that, according to the 1976 City Planning Commission Report (the "1976 CPC Report") regarding the creation of the Special Ocean Parkway District, the special district was created in response to community concerns over the growing number and size of community facility buildings and their impacts on residential district, primarily in terms of neighborhood character and appearance, light, air, and privacy; and

WHEREAS, the Appellant states that the 1976 CPC Report included no reference to impacts on purely commercial districts i.e., commercial district not mapped within residence districts, such as C4-2 or C8-2 districts; as such, the Appellant asserts that DOB's interpretation of ZR § 113-11 does nothing to further the intent of the Special Ocean Parkway District; and

WHEREAS, the Appellant also notes that this particular site and block have, according to historic records, a strong history of commercial use and thus no residential character to be preserved by the Special Ocean Parkway District; and

WHEREAS, the Appellant contends that the CPC's clear intent to limit community facility FAR in residence districts—and lack of intent to limit community facility FAR in purely commercial districts—is evidenced by ZR § 113-11(d), which allows higher community facility FARs by CPC certification on corner lots within certain R6 or R7 districts pursuant to ZR § 113-41; and

WHEREAS, the Appellant states that the certification is consistent with the intent of the Special Ocean Parkway District to slow the proliferation of oversized community facilities in areas developed with low-rise residential buildings but to allow larger community facility in denser residence districts on corner lot, where larger buildings are more appropriate; and

WHEREAS, the Appellant also asserts that there is no plausible land use rationale for allowing, albeit by certification, larger community facility buildings in an R6 zoning district (where only residences and community facilities are permitted) than in a C4-2 zoning district (where residences, community facilities, and commercial buildings are permitted), particularly where the CPC noted that the concern was the impact of large community facilities on residences (rather than on commercial uses or mixed-use portions of the neighborhood); and

WHEREAS, further, the Appellant states that, paradoxically, the site is in a worse position to construct a community facility because it is in C4-2 district (where ZR § 23-00 limits the maximum FAR to 0.78, which is the maximum permitted FAR for a residence in an R6-equvialent district) than it would be if it were *actually* in an R6 district, where ZR §§ 113-41 and 24-00 would permit a maximum FAR of 4.8; thus, applying the text as DOB interprets actually yields the larger community facility building in the residence district – which, the Appellant asserts, is entirely contrary to the intent of the Special Ocean Parkway District regulations; and

WHEREAS, likewise, the Appellant states that if the intent of the special district had been to limit the size of community facility buildings in commercial districts and residence districts alike, CPC's omission of C8-2 districts was both arbitrary and ineffectual, since a significantly greater portion of the Special Ocean Parkway District is zoned C8-2 (where, per DOB, the maximum community facility FAR is 4.8) than is zoned C4-2 (where, per DOB, the maximum community facility FAR is 0.78); and

WHEREAS, the Appellant also notes that general land use and zoning principles dictate that community facilities are favored uses, which should be encouraged; as such, the Appellant states that community facility FARs are almost always equal to or higher (and almost never lower) than the maximum FARs for residences and commercial uses; and

WHEREAS, accordingly, the Appellant requests that the Board grant the appeal, reverse the Final Determination, and declare that the maximum FAR for a community facility building in C4-2 district within the Special Ocean Parkway District is 4.8 FAR; and

B. DOB'S POSITION

WHEREAS, DOB contends that that the Final Determination was properly issued because it is consistent with: (1) plain text of ZR § 113-11; (2) the Zoning Resolution rules of interpretation; and (3) the intent of the Special Ocean Parkway District; and

WHEREAS, DOB states that the plain text of ZR § 113-11 supports its determination that the maximum permitted community facility FAR for the C4-2 portion of the site is 0.78 FAR; and

WHEREAS, DOB contends that ZR § 113-11 imposes the district bulk regulations of Article II, Chapter 3 on portions of the building that contain community facility uses; and

WHEREAS, DOB states that since the building is located in a commercial district, the residence district designation assigned to the commercial district—the residential district equivalent—must be used to determine the applicable residence district bulk regulations, per ZR § 34-112; thus, pursuant to ZR § 34-112, the R6 bulk regulations apply in a C4-2 district, and the maximum residential FAR in an R6 zoning district is 0.78 FAR, per ZR § 23-142; and

WHEREAS, DOB states that ZR § 113-11's use of the phrase "applicable underlying" ([a]ll community facility buildings, and portions of buildings containing community facility uses, shall be subject to the applicable underlying district bulk regulations of Article II, Chapter 3 . . .") signals an intent for the provision to apply wherever there is an applicable bulk regulation in Article

II, Chapter 3; and

WHEREAS, DOB states that, according to the clear and unambiguous text of ZR § 34-112, R6 district bulk regulations are applicable in a C4-2 district; as such, contrary to the Appellant's assertion, there is an "applicable" residence district bulk regulation to be incorporated by ZR § 113-11 in the C4-2 district; and

WHEREAS, DOB disagrees with the Appellant that ZR § 113-11 imposes Article II, Chapter 3 bulk regulations only on buildings if they are in an "underlying" residential district (or in a commercial overlay, in which a residential district is considered the underlying district) and asserts that this interpretation is contrary to the Zoning Resolution's rules of interpretation; and

WHEREAS, DOB states that, according to the ZR § 12-02 rules for interpretation of district designations,

> [w]hen no district designations are listed for a specific section, the provisions of such section shall be construed to apply to all districts under consideration in the article in which the section appears, or, if specified, only to those districts referred to directly within the section itself; and

WHEREAS, DOB notes that both C4-2 and C8-2 districts remain mapped within the Special Ocean Parkway District and thus concludes that such districts were "under consideration" as that phrase is used in ZR § 12-02; and

WHEREAS, accordingly, DOB asserts that if the drafters of the Special Ocean Parkway District regulations had intended to exclude purely commercial districts from the modification set forth in ZR § 113-11, the text would have included only residence districts within a ruled bar below the number and title of the section; and

WHEREAS, DOB observes that ZR § 113-11 contains no such district designations and, therefore, is not limited solely to residence districts but is applicable anywhere the bulk regulations of Article II, Chapter 3 are applicable, including within a C4-2 district; and

WHEREAS, DOB contrasts the applicability of the R6 bulk regulations in a C4-2 district with the absence of bulk regulations for a residence in a C8-2 district; residences are not permitted as-of-right in a C8-2 district, so ZR § 34-112 need not supply a residence district equivalent; thus, ZR § 113-11 does not modify the bulk regulations for community facilities in a C8-2 district and the general provision applicable in the C8-2 district (ZR § 33-123) governs; and

WHEREAS, DOB also notes that ZR § 113-11 includes four exceptions to the applicability of the bulk regulations of Article II, Chapter 3—the R2X district, contextual R6 and R7 districts, the Subdistrict and non-contextual R6 and R7 districts—but does not include an exception for purely commercial districts; based on this omission, DOB concludes that Article II, Chapter 3 bulk regulations apply to residence district and their commercial district equivalents; and

WHEREAS, DOB states that the concept of applying residential district regulations in commercial districts appears throughout the Zoning Resolution, but the text does not refer to ZR § 34-112 in every instance; and

WHEREAS, DOB notes that throughout the Zoning Resolution, reference is made to ZR § 34-11 where the bulk regulations of particular residential district equivalents are relevant: ZR §§ 13-242, 28-01, and 36-532 govern particular residential equivalents and identify ZR § 34-112; and

WHEREAS, in contrast, DOB states that where the provisions of Article II, Chapter 3 apply generally, the Zoning Resolution makes inconsistent reference to ZR § 34-112; for example, ZR § 34-221 imposes the bulk regulations of Article II, Chapter 3 on the C1 through C6 districts without reference to ZR § 34-112's listing of residential equivalents of those commercial districts, yet ZR §§ 33-123 and 34-24 apply Article II Chapter 3 broadly to commercial districts and expressly refer to ZR §§ 34-112 and 34-11, respectively; and

WHEREAS, accordingly, DOB concludes that although the Zoning Resolution makes occasional reference to ZR § 34-11 when residential district regulations apply in commercial districts for the sake of clarity, no difference in meaning can be attributed to the provisions that omit such reference; and

WHEREAS, further, DOB contends that it is understood that where special district regulations mandate use of residential district bulk regulations in special districts that include commercial districts, as ZR § 113-11 does, a reference to ZR § 34-112 is not needed because residential equivalents must be employed in order to comply with the mandate; and

WHEREAS, DOB states that for example, in the Special Bay Ridge District, ZR § 114-11 provides that for a building with community facility and residential uses, the bulk regulations of Article II, Chapter 3 apply to all portions of the building except that where certain conditions are met, the bulk regulations of Article II, Chapter 4 may be used for the community facility portion of the building; since a C4-2A district is mapped within the Special Bay Ridge District, by necessity ZR § 34-112 must be used to identify the appropriate residential district equivalent that controls bulk within that underlying commercial district; and

WHEREAS, as to the Appellant's assertion that ZR § 113-11 should have been amended by the 2011 Key Terms Amendment to include ZR § 34-112, if reference to the latter was required, DOB disagrees and notes that while the text of ZR § 113-11 was modified by the Key Terms Amendment, the substantive changes to ZR § 113-11 occurred in 1993 and 1996; further, DOB asserts that using ZR § 34-112 to identify the applicable Article II Chapter 3 regulation in commercial districts with a residential district equivalent does not conflict with the ZR § 113-11 exceptions in either their pre- or post-Key Terms Amendment form; and

WHEREAS, DOB contends that its interpretation of ZR § 113-11 is consistent with the intent of the Special Ocean Parkway District; and

WHEREAS, DOB states that, according to the 1976 CPC Report, the stated goal of the Special Ocean Parkway District is to prevent the greater bulk allowed for community facilities from having an adverse effect on light and air, privacy and livability for adjacent *residences*; and

WHEREAS, DOB asserts that to allow the full community facility FAR in the C4-2 would not be consistent with the special district's goal of keeping schools and houses of worship in scale with adjacent housing development; and

WHEREAS, DOB notes that ZR § 113-11 does not operate to reduce community facility bulk in the C8-2 districts because residences are not allowed in such districts; therefore, there is no need to reduce the bulk of community facilities in the C8-2 where there are no residences requiring protection; and

WHEREAS, DOB also disagrees with the Appellant that it is irrational to interpret ZR § 113-11 to impose R6 bulk regulations on community facilities in a C4-2 district because ZR § 113-11(d) authorizes a CPC certification to permit an increase in FAR on certain sites within R6 and R7 districts but not in the C4-2 district even though R6 is the C4-2 residential equivalent; and

WHEREAS, rather, DOB states that the scheme alleviates the imbalance between large community facilities and other as-of-right uses in the Special Ocean Parkway District; and

WHEREAS, as noted above, DOB states that the Special Ocean Parkway District was expressly enacted to ease impacts associated with the uncontrolled increase of larger community facility buildings on the residential character and appearance of the community; however, nothing in the 1976 CPC Report suggested that commercial development in the few commercial districts of the special district was undesirable; and

WHEREAS, accordingly, DOB contends that ZR § 113-41 allows certifications only for community facilities on a corner lot and fronting on a wide street in R6 and R7 districts, and not their commercial equivalents, so as to avoid any adverse impact on commercial uses that may result from allowing new community facilities with the greater Article II, Chapter 4 bulk in those commercial districts; and

WHEREAS, finally, DOB disagrees with the Appellant's claims that the because the subject block was already developed with large commercial uses by the time the Special Ocean Parkway District was created, the regulations could not possibly function to preserve a residential neighborhood character at the site; DOB also notes that, in enforcing the Zoning Resolution, it is without authority to take into consideration a claim that the purpose of a Zoning Resolution provision is not accomplished within a particular area or that such provision has unintended consequences; and

WHEREAS, accordingly, DOB requests that the Board deny the appeal and affirm the Final Determination; and

C. DCP'S POSITION

WHEREAS, as noted above, by letter dated June 6, 2014, the DCP states that it supports DOB's position; and

WHEREAS, in pertinent part, DCP's letter provides that

> [t]he legislative history surrounding the adoption of the text that created the Special Ocean Parkway District reveals that Commission was concerned that the proliferation of community facility buildings throughout the special district, and their size, was having an overwhelming effect on the low scale residential development that generally characterized the area . . . .
>
> The Commission's concerns regarding out-of-scale community facility buildings overwhelming the residential character of the communities surrounding Ocean Parkway is clearly reflected throughout the CPC's reports of approval to adopt the text amendments that established, and thereafter amended, the special district regulations.
>
> * * *
>
> DOB's determination, that, pursuant to Section 113-11 of the Zoning Resolution, the portion of a community facility building located in a C4-2 district within the Special Ocean Parkway District at [902 Quentin Road, Brooklyn] is subject to the applicable underlying district bulk regulations of Article II, Chapter 3, is consistent with the Commission's land use planning concerns surrounding the adoption of the Special Ocean Parkway District text. DOB's determination is also consistent with the plain language of Section 113-11, which clearly sets forth that all community facility buildings shall be subject to the applicable underlying district bulk regulations of Article II, Chapter 3.
>
> *In a C4-2 district, the underlying bulk regulations of Article II, Chapter 3 are made applicable to residential use within such district, pursuant to Section 34-10* (Applicability of Residence District Bulk Regulations). *Accordingly, as directed by Section 113-11*, notwithstanding and in lieu of the underlying bulk regulations of Article II, Chapter 4 or Article III, Chapter 3, that may be otherwise generally applicable to community facilities, *all community facility building are subject to the bulk regulations of Article II, Chapter 3*. (emphasis added); and

CONCLUSION

WHEREAS, the Board finds that DOB's interpretation is consistent with text of ZR § 113-11, the Zoning Resolution rules of interpretation, and the intent of the Special Ocean Parkway District; as such, the Final Determination is affirmed and the appeal is denied; and

WHEREAS, the Board agrees with DOB that the text supports its determination that pursuant to the requirements of ZR § 113-11, the maximum permitted community facility FAR for the C4-2 portion of the site is governed by Article II, Chapter 3; and

WHEREAS, the Board finds that where ZR § 113-11 provides that "[a]ll community facility buildings, and portions of buildings containing community facility uses, shall be subject to the applicable underlying district bulk regulations of Article II, Chapter 3," the plain meaning of the text is that to the extent that Article II, Chapter 3 provide bulk regulations that are *applicable*, such regulations govern; and

WHEREAS, the Board agrees with DOB that it is appropriate to look to ZR § 34-112 to determine how to apply Article II, Chapter 3 within a C4-2 district, because ZR § 34-112 establishes the corresponding residence district regulations for a C4-2 district; and

WHEREAS, the Board finds that because residences are permitted in a C4-2 district, there are *applicable* bulk regulations in Article II, Chapter 3, which, pursuant to ZR § 113-11, limit the maximum community facility FAR to the maximum permitted in the C4-2 equivalent district (R6); and

WHEREAS, the Board rejects the Appellant's contention that ZR § 113-11 imposes Article II, Chapter 3 bulk regulations only on buildings if they are in an "underlying" residential district (or in a commercial overlay, in which a residential district is considered the underlying district) and agrees with DOB that such an interpretation is contrary to the Zoning Resolution's rules of interpretation; and

WHEREAS, further, the Board finds that, in accordance with the ZR § 12-02 rules of interpretation, the Special Ocean Parkway District regulations govern throughout the special district, including in C4-2 and C8-2 districts; as such, the community facility FAR modification set forth in ZR § 113-11 applies not only in residence districts but also in C4-2 and C8-2 districts; and

WHEREAS, the Board notes the distinction between ZR § 113-11 *applying* in these purely commercial district and *resulting in a modification*—a change in what the Zoning Resolution allows one to construct; ZR § 113-11 applies in a C8-2 district, but does not result in a modification of the community facility bulk regulations because residences are not permitted as-of-right in a C8-2 district; thus, there is no C8-2 residence district equivalent, there are no residential bulk regulations for ZR § 113-11 to incorporate, and, the general provision applicable to community facilities in the C8-2 district (ZR § 33-123) applies; and

WHEREAS, the Board also notes that ZR § 113-11 includes four exceptions to the applicability of the bulk regulations of Article II, Chapter 3—the R2X district, contextual R6 and R7 districts, the Subdistrict and non-contextual R6 and R7 districts—but does not include an exception for purely commercial districts; thus, the Board agrees with DOB that Article II, Chapter 3 bulk regulations apply to residence district and their commercial district equivalents; and

WHEREAS, the Board disagrees with the Appellant that ZR § 34-112 must be specifically incorporated into ZR § 113-11 in order for it to be considered; and

WHEREAS, the Board finds that because the Zoning Resolution makes inconsistent reference to ZR § 34-11 when residential district regulations apply in commercial districts, the absence of any reference to that provision in ZR § 113-11 was not meaningful; and

WHEREAS, rather, the Board finds that where special district regulations (including ZR § 113-11) mandate use of residential district bulk regulations in special districts that include commercial districts, an explicit reference to ZR § 34-112 is not needed because residential equivalents must be employed in order to comply with that mandate; and

WHEREAS, likewise, the Board disagrees with the Appellant's assertion that ZR § 113-11 should have been amended by the 2011 Key Terms Amendment or by the 1993 or 1996 amendments to the special district provisions to include ZR § 34-112, if reference to the latter was required; and

WHEREAS, the Board finds that, for the reasons detailed above, clarification on the applicability of ZR § 34-112 *vis à vis* ZR § 113-11 was and is unnecessary; thus, there was no reason to amend ZR § 113-11 to include ZR § 34-112; further, as noted above, DCP submitted a letter supporting DOB's interpretation of ZR § 113-11; in the letter, DCP states unequivocally that

> DOB's determination is also consistent with the plain language of Section 113-11, which clearly sets forth that all community facility buildings shall be subject to the applicable underlying district bulk regulations of Article II, Chapter 3; and

WHEREAS, the Board also notes that the 1993 amendment, which clarified the applicability of the CPC certification in certain residence districts, did not alter the portion of the text that created the general requirement to apply Article II, Chapter 3 – that text was preserved in its 1976 version; as to the Key Terms Amendment, the Board finds that it did nothing to alter the substantive requirements of ZR § 113-11; and

WHEREAS, the Board also finds that DOB's interpretation of ZR § 113-11 furthers the intent of the Special Ocean Parkway District; and

WHEREAS, the Board has reviewed the 1976 CPC Report, and agrees with DOB that the Special Ocean Parkway District was created in response to community concerns regarding large community facilities and their potential adverse effects on residences; in pertinent part, the 1976 CPC Report states that

> [t]he Special Ocean Parkway District seeks to alleviate the problems associated with the uncontrolled increase of the larger community facility building to preserve the residential character and appearance of the community.
>
> To achieve these goals the Special Ocean Parkway District regulations provide that: all new community facility developments or enlargements will be limited to the residential bulk regulations of the underlying districts; and

WHEREAS, the Board also notes that DCP confirmed this as the purpose of the Special Ocean Parkway District in its June 6, 2014 letter; and

WHEREAS, the Board finds that ZR § 113-11 rationally accomplishes this goal by limiting the size of community facilities in districts where residences are permitted as-of-right, namely, all residence districts and C4-2 districts, while preserving the ability to develop large community facilities in a C8-2 district, where residences are not permitted as-of-right; and

WHEREAS, as to the Appellant's assertion that it is irrational to interpret ZR § 113-11 to impose R6 bulk regulations on community facilities in a C4-2 district since ZR § 113-11(d) authorizes a CPC certification to permit an increase in FAR on certain sites within R6 and R7 districts (but not in the C4-2 district even though R6 is the C4-2 residential equivalent), the Board disagrees; while the certification has the potential to allow a greater community facility FAR in an R6 district than in a C4-2 district, the possibility of such an outcome does not change the plain meaning of the portion of ZR § 113-11 that makes Article II, Chapter 3 applicable in the C4-2 district; and

WHEREAS, the Board also finds that DOB properly disregarded the Appellant's assertions regarding the actual lack of residential development on the subject block as reason for interpreting ZR § 113-11 differently; as DOB notes, it is limited by the Charter to interpreting the text of the Zoning Resolution; therefore, whether a provision of the Zoning Resolution is ineffectual as to its objectives or, on occasion, has unintended consequences are not bases for DOB to adopt an interpretation that would be contrary to the text of such provision; similarly, the extent to which a block's zoning designation is inconsistent with its history and built character is primarily a concern for the City Planning Commission, as is whether a provision of the text sometimes produces anomalous results; and

WHEREAS, likewise, the Board observes that in reviewing a provision of the Zoning Resolution, the Board is limited to reviewing the text in light of the language it employs and its legislative history; while the Board can consider the effects of the provision—both intended and unintended—the Board cannot disregard the plain language of the text unless applying the plain language produces an absurd result; and

WHEREAS, here, the Board finds that there is nothing absurd about the result of DOB's interpretation of ZR § 113-11; it is consistent with the text and the rules of interpretation for the Zoning Resolution, and it furthers the purpose of the special district (limiting the size of community facilities in districts where residences are permitted); further, it is supported by DCP, which drafted the provision; and

Therefore it is Resolved, that the subject appeal, seeking a reversal of the Final Determination, dated January 14, 2014, is hereby *denied*.

Adopted by the Board of Standards and Appeals, June 24, 2014.

A true copy of resolution adopted by the Board of Standards and Appeals, June 24, 2014.
Printed in Bulletin No. 26, Vol. 99.

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Fire Com'r.
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