



CITY PLANNING COMMISSION

September 19, 2007/Calendar No. 15

C 070469 ZSM

IN THE MATTER OF an application submitted by 400 Fifth Realty LLC and 401 Fifth LLC pursuant to Sections 197-c and 201 of the New York City Charter for the grant of a special permit pursuant to Sections 81-212, 74-79 and 81-85 (new section) to: (1) allow the transfer of 173,692 square feet of floor area from a landmark building; and (2) modify the requirements of Section 81-84 (Mandatory Regulations and Prohibitions) to allow a hotel lobby within 50 feet of the Fifth Avenue street line and Sections 81-45 (Pedestrian Circulation Space) and 37-07 (Requirements for Pedestrian Circulation Space) to allow a reduction of the amount and dimensional requirements of the required pedestrian circulation space to facilitate the development of a 57-story mixed use building on property located at 400- 404 Fifth Avenue (Block 838, Lots 42, 45, 46, 47 and 48), in a C5-3 District, within the Special Midtown District (Fifth Avenue Subdistrict), Borough of Manhattan, Community District 5.

This application for a special permit was filed by 400 Fifth Realty LLC and 401 Fifth LLC on May 10, 2007 to facilitate the construction of a 57 story mixed use building with approximately 389 residential units, 200 hotel rooms and approximately 28,707 square feet of retail space on the southwest corner of Fifth Avenue and West 36th Street. The application was revised on August 30, 2007 to reduce the residential floor area and increase the hotel floor area within the proposed building.

RELATED ACTIONS

In addition to the special permit which is the subject of this report (C 070469 ZSM), implementation of the proposed development also requires action by the City Planning Commission on the following applications which are being considered concurrently with this application:

- N 070468 ZRM Text Amendment to Sections 74-79, 81-212, and 81-85 (new section) to allow modification of Sections 81-40 (Mandatory District Plan Elements of the Special Midtown District), 37-07 (Requirements for Pedestrian Circulation Space), and Section 81-84 (Mandatory Regulations and Prohibitions of the Fifth Avenue Subdistrict).
- C 070470 ZSM Special Permit pursuant to Section 81-277 of the Zoning Resolution to allow for the modification of alternative height and setback regulations – daylight evaluation.

BACKGROUND

400 Fifth Realty LLC and 401 Fifth LLC are requesting special permits and a zoning text amendment to facilitate the construction of a new mixed-use building containing approximately 389 residential units, 200 hotel rooms, and approximately 28,707 square feet of retail space.

The special permit that is the subject of this report would allow the applicant to transfer floor area from a zoning lot containing the landmarked Tiffany Building (Block 866, Lots 3, 76, and 9076) to the project site, 400-404 Fifth Avenue (Block 838, Lots 42, 45, 46, 47, and 48). It would also allow for a waiver of the pedestrian circulation space requirements of the Special Midtown District and lobby restrictions of the Fifth Avenue Subdistrict. In addition the applicant's proposal also requires a zoning text amendment (C070468 ZRM) to allow for waivers of pedestrian circulation space and lobby restrictions that are being sought as part of the special permit that is the subject of this report. The application also requests a special permit

(N 070470 ZSM) in order to waive the height and setback requirements of the Special Midtown District.

400-404 Fifth Avenue is located on the corner of the west side of Fifth Avenue between West 36th And West 37th Streets. (Block 838; Lots 42, 45, 46, 47, and 48). Lots 42, 45, 46, and 47 are currently vacant. Lot 48 contains an existing landmark building, 404 Fifth Avenue, which was designated by the Landmarks Preservation Commission on April 26, 2006. 404 Fifth Avenue is owned by 404 Fifth Avenue, LLC, which is an affiliate of 401 Fifth Avenue LLC, a co-applicant and the owner of the Tiffany Building, which is the granting site for the requested transfer of development rights.

400-404 Fifth Avenue is located in a C5-3 zoning district within the Fifth Avenue Subdistrict of the Special Midtown District. The basic maximum permitted floor area ratio for residential use is 10.0, which may be increased to 12.0 through the provision of residential recreation space; the basic maximum FAR for commercial use, community facility use and mixed use buildings is 15.0; and the maximum FAR with as-of-right incentives is 16.0. The site has a lot area of 26,317 square feet, which permits 394,755 square feet of floor area to be developed at the basic maximum FAR of 15.0. It has approximately 197 feet of frontage on Fifth Avenue, approximately 125 feet of frontage on West 36th Street, and approximately 141 feet of frontage on West 37th Street.

The Tiffany Building is located across Fifth Avenue on a zoning lot which contains 21,710 square feet of lot area (Block 866, Lots 3, 76, and 9076). Lot 3, 393 Fifth Avenue, is a seven

story commercial building, Lot 76 is the Tiffany Building, and Lot 9076 is an airspace parcel located above Lot 76 that was created as a way of holding the floor area in separate ownership. 21,513 square feet of the zoning lot is located in a C5-3 zoning district within the Fifth Avenue Subdistrict of the Special Midtown District; the balance is located in a C5-2 zoning district. Pursuant to Sections 74-79(c)(1), 81-212 and 81-211 of the Zoning Resolution, for a landmark zoning lot located in a C5-3 zoning district, the development rights available for a transfer pursuant to Section 74-79 of the Zoning Resolution are equal to 16.0 FAR. At a FAR of 16.0, the C5-3 portion of the landmark zoning lot generates a total floor area of 344,208 square feet. The C5-3 portion of the landmark zoning lot is currently improved with 154,508 square feet of floor area, and thus has 189,700 square feet of floor area available for transfer. The applicant is not proposing to transfer any of the floor area located in the C5-2 portion of the zoning lot.

The Tiffany & Company Building was previously the subject of a special permit (C 030353 ZSM) pursuant to Section 74-711 of the Zoning Resolution which was approved on July 23, 2003 to allow a bank to occupy street frontage and lot area within 50 feet of Fifth Avenue in excess of the limitations set forth in the Fifth Avenue Subdistrict regulations. The continuing maintenance program established in connection with that special permit was incorporated into a restrictive declaration recorded against 401 Fifth Avenue. In connection with this application, that declaration would be superseded by a new declaration providing for an updated continuing maintenance program.

Project Area

The project site, which is the subject of this special permit, is located in Community District 5 in the southern portion of the midtown central business district at the confluence of several different commercial areas and is surrounded by a mix of historic buildings and new construction. The midtown office core is located to the north of the development site and contains a mix of low- and high-rise buildings. The Special Garment Center District, located to the south and west of the site, is characterized by a mix of office and loft buildings.

Fifth Avenue between 34th Street and 42nd Street contains a mix of uses and architectural styles. The Empire State Building is located on the southwest corner of Fifth Avenue and West 34th Street. The Gorham Building, to the immediate south of the subject zoning lot across West 36th Street, is an 8-story designated landmark designed by McKim, Mead & White in the Italian Renaissance style.

North of the project site are two recently constructed as-of-right buildings, 420 and 425 Fifth Avenue. 420 Fifth Avenue, a 30-story office building located across 37th Street from the development site, was constructed in 1993. To the northeast of the site, at the corner of East 38th Street and Fifth Avenue, stands 425 Fifth Avenue, a new 56-story residential building. An as-of-right development with three setbacks, this 16.0 FAR building is 625 feet tall. Further north on Fifth Avenue are the Lord & Taylor Department Store, the 29-story HSBC Bank Headquarters Building, Bryant Park, and the New York Public Library. West 36th Street between Fifth and Sixth Avenues is mostly improved with 4- to 16- story commercial and office buildings.

Project Description

The proposed mixed use building to be developed at 400 Fifth Avenue (Block 838, Lots 42, 45, 46, and 47) would contain retail uses, lobbies, and loading areas on the ground floor. Additional retail use would occupy the second floor and cellar levels. Transient hotel uses would occupy the 3rd through 10th and 12th through 16th floors. Accessory hotel space and tenant amenities are programmed for floor 11. Mechanical equipment would occupy the 17th floor as well as the roof or penthouse level. Residential uses would occupy the 18th through the 57th floors. In total the building would contain approximately 490,311 square feet of floor area, including approximately 315,803 square feet of residential use (approximately 389 units), 156,600 square feet of hotel use (approximately 200 rooms) and 17,679 square feet of retail use. The cellar level would contain approximately 10,899 gross square feet of retail use (in addition to accessory and building services uses), such that the proposed building as a whole would contain approximately 28,707 gross square feet of retail use.

The proposed building at 400 Fifth Avenue would rise to a height of 631 feet. At a height of 126 feet, the building would set back 22.25 feet from Fifth Avenue and 18.17 feet from West 36th Street. Above this height, the building would rise without setback. The design of the proposed building thus consists of a tower set back from the street, atop a 10-story base or podium.

The building would contain up to five entrances, two along each of Fifth Avenue and West 36th Street and one at the corner of Fifth Avenue and West 36th Streets. The larger entrance at the northern end of the Fifth Avenue frontage, next to 404 Fifth Avenue, would serve as the entrance

for the hotel. The remainder of the Fifth Avenue frontage and the angled corner condition at Fifth Avenue and West 36th Streets would be occupied by retail storefronts.

The residential entrance would be located further west along the West 36th Street frontage, commencing approximately 54 feet from Fifth Avenue. The western end of the West 36th Street frontage would be anchored by the proposed building's single loading berth, which would be located approximately 100 feet from Fifth Avenue. 404 Fifth Avenue, which is adjacent to the proposed mixed-use development and which is landmarked, would remain.

REQUESTED ACTIONS

To facilitate the proposed development, the following actions are required:

Special Permit (C 070469 ZSM)

The applicant, 400 Fifth Realty LLC, requests a special permit pursuant to Sections 74-79 and 81-212 of the Zoning Resolution to allow for the transfer of development rights from the landmark zoning lot containing the Tiffany Building and to modify the Mandatory Plan Elements for the Special Midtown District (81-40), Requirements for Pedestrian Circulation Space (37-07) and the Mandatory Regulations of the Fifth Avenue Subdistrict (81-84) to facilitate the construction of a 57 story mixed use building on West 36th Street and Fifth Avenue (Block 838, Lots 42, 45, 46, 47, with Lot 48 being an air rights parcel).

The applicant is proposing to transfer 173,692 square feet of floor area from the zoning lot containing the Tiffany Building to the development site. This is less than the total of 189,700

square feet available from the C5-3 portion of the landmark zoning lot. With the transfer, the receiving lot would be developed with a total of 568,447 square feet, at an FAR of 21.6. Section 81-211 of the Zoning Resolution provides that there is no limit on the amount of floor area that may be transferred to a receiving lot in a C5-3 district as a part of a transfer of development rights from a landmark (74-79).

The special permit as proposed would also grant the following modifications:

a) 81-84(a) (Mandatory Regulations and Prohibitions/Pedestrian access to uses)

Pursuant to Section 81-84(a) of the Zoning Resolution, hotel lobby entrances are prohibited on or within 50 feet of Fifth Avenue in the Fifth Avenue Subdistrict. Accordingly, compliance with Section 81-84(a) of the Zoning Resolution would require that the hotel lobby entrance be located on West 36th Street. The applicant is seeking a waiver of this provision in order to locate the hotel entrance on Fifth Avenue.

b) 81-45 (Pedestrian Circulation Space), and 37-07 (Requirements for Pedestrian Circulation Space)

Section 81-45 of the Zoning Resolution provides that within the Special Midtown District, all new developments or enlargements on zoning lots of 5,000 square feet or larger with more than 70,000 square feet of new floor area must provide pedestrian circulation space in accordance with Section 37-07 of the Zoning Resolution. Section 37-07 provides that on zoning lots in excess of 20,000 square feet, one square foot of pedestrian circulation space must be provided for every 300 square feet of new floor area. The proposed building will have 490,311 square feet of floor area requiring the provision of 1,634 square feet of pedestrian circulation space. The

applicant is proposing to provide a total of 810 square feet of pedestrian circulation space in the form of building entrance recesses; one at the corner of Fifth Avenue and West 36th Street and two others along each of those frontages.

In order to approve the special permit, the Commission must make findings relating to the effect of the additional bulk and height and setback waivers on surrounding buildings, the benefit of the landmark's preservation in relation to any loss of light and air, the value of the preservation program put in place for the continuing maintenance of the landmark, and that the proposed building relates harmoniously with surrounding landmarks.

In connection with this application the Landmarks Preservation Commission has approved certain restoration work and a program of continuing maintenance for the Tiffany & Company Building. The restoration work is the work approved by the Landmarks Preservation Commission under Certificate of No Effect 06-0985, dated August 10, 2005 and includes the installation of new tile roofing on the sloped portions of the Tiffany & Company Building facing Fifth Avenue and West 37th Street and associated cooper flashing. Under the Continuing Maintenance Program, as approved by the Landmarks Preservation Commission under MOU 06-0986, dated August 10, 2005 and MISC 07-4085, dated December 1, 2006, the Tiffany & Company Building's owner or its successor in interest shall engage a preservation architect, engineer or other qualified person to perform an inspection of the Tiffany & Company Building every five years. The periodic inspection shall include review of the Tiffany & Company Building's cornice, columns, façade, storefronts, windows and roof. The preservation architect, engineer or other qualified person shall submit a report on each periodic inspection to the owner

and the Landmarks Preservation Commission outlining the existing conditions of the Tiffany & Company Building and detailing the work that should be performed in order to maintain the Tiffany & Company Building in a sound first-class condition. The owner or its successor in interest is required to perform the repairs and rehabilitation detailed in the report.

Text Amendment (N 060433 ZRM)

This application seeks a zoning text amendment to Sections 81-212, 81-81 and 81-85 (new Section) of the Zoning Resolution to allow modification of Sections 81-40 (Mandatory District Plan Elements) and 81-84 (Mandatory Regulations and Prohibitions of the Fifth Avenue Subdistrict) in connection with a Section 74-79 special permit.

Section 74-79 of the Zoning Resolution currently provides that the City Planning Commission may grant waivers in connection with the transfer of development rights to adjacent lots from lots occupied by landmark buildings. Section 74-79, however, does not permit the modification of any regulations specifically applicable to the Special Midtown District or the Fifth Avenue Subdistrict.

The proposed text amendment would provide a mechanism for waiving the Mandatory District Plan Elements in Midtown (Section 81-40) and the Mandatory Regulations and Prohibitions of the Fifth Avenue Subdistrict (Section 81-84) in order to, as a part of the special permit to transfer development rights from an adjacent landmark (Section 74-79) in the Fifth Avenue Subdistrict, provide less pedestrian circulation space than is required, and locate a hotel lobby on Fifth Avenue.

In order to grant the special permit, the Commission would have to make findings in 74-792(e) relating to the effects of the increased bulk and height and setback waivers in comparison to the benefit of the preservation of the landmark, the merits of the preservation program put in place, and a finding pursuant to the new section 81-85 concerning the relationship of a proposed building with surrounding landmarks.

Special Permit (C 070470 ZSM)

400 Fifth Realty LLC also requests a special permit pursuant to Section 81-277 of the Zoning Resolution to allow for modification of height and setback requirements in the Special Midtown District as a part of a transfer of development rights from a landmark. Because the proposed building encroaches within the half-setback lines (a line parallel to the street line and halfway between the street line and the setback line as defined in 81-263) it is not in compliance with Section 81-26 (Daylight Compensation). The building is therefore analyzed for purposes of this application under Section 81-27 of the Zoning Resolution (Alternative Height and Setback Regulations – Daylight Evaluation) where it is possible to evaluate the degree of waiver being sought. Section 81-274 provides that a development or enlargement must have an overall score of not less than 75 percent, with no single street frontage having a street score of less than 66 percent. As set forth in the plans submitted with this application, the 36th Street score is 5.28 percent, the Fifth Avenue score is 77.78 percent, the 37th Street score for the proposed building is 46.22 percent, and the overall score is 48.63 percent.

This applicant has proposed these modifications to height and setback in order to construct a building with a streetwall that complements 404 Fifth Avenue the landmark building to the immediate north of the proposed building.

The Commission must find, in order to grant this special permit, that: the modification to height and setback requirements being requested is the minimum amount necessary to achieve a feasible design, the reduced amount of light and air is offset by the benefits to the City of the preservation of the landmark, and the modification to height and setback regulations will protect the setting of the landmark.

ENVIRONMENTAL REVIEW

This application (C 070469 ZSM), in conjunction with the application for the related actions (N 070468 ZRM & C 070470 ZSM), was reviewed pursuant to the New York State Environmental Quality Review Act (SEQRA), and the SEQRA regulations set forth in Volume 6 of the New York Code of Rules and Regulations, Section 617.00 et seq. and the City Environmental Quality Review (CEQR) Rules of Procedure of 1991 and Executive Order No. 91 of 1977. The designated CEQR number is 06DCP093M. The lead is the City Planning Commission.

After a study of the potential environmental impact of the proposed action, a Negative Declaration was issued on May 21, 2007.

UNIFORM LAND USE REVIEW PROCEDURE

This application (C 070469 ZSM) along with the related actions (N 070468 ZRM & C 070470 ZSM) was certified as complete by the Department of City Planning on May 21, 2007 and was referred to Community Board 5 and the Borough President in accordance with Title 62 of the Rules of the City of New York, Section 2-02(b). The related text amendment (N 0704682 ZRM) was referred for information and review in accordance with the for referring non-ULURP matters.

Community Board Review

Community Board 5 held a public hearing on the application on June 14, 2007, and on that day, by a vote of 22 in favor to 13 opposed with two abstentions, adopted a resolution recommending approval of the application.

Borough President's Recommendation

This application was considered by the Borough President, who issued a recommendation on July 20, 2007 in favor of approving the application.

City Planning Commission Public Hearing

On July 25, 2007 (Calendar No. 11), the City Planning Commission scheduled August 8, 2007 for a public hearing on this application (C 070469 ZRM). The hearing was duly held on August 8, 2007 (Calendar No. 38) in conjunction with the public hearing on the related actions (N 070468 ZRM & C 070470 ZSM) and was continued to August 22, 2007 (Calendar No. 18). On August 8, 2007 four speakers spoke in favor of the application and related applications, and none spoke in opposition.

The applicant's attorney spoke in favor of the application and discussed the history of the 74-79 Special Permit and why it was appropriate to allow for additional waivers as a part of this permit. The architect of the building explained the evolution of the design concept as well as how the building related with the surrounding landmarks and discussed the differences between the as of right building and the one being proposed.

The Borough President's Director of Land Use appeared in favor of the application. The applicant's consultant spoke in favor and discussed the location of the building entrances. In response to concerns raised by the Commission the representative explained that the hotel lobby was set on Fifth Avenue and not on 36th Street in order to enliven Fifth Avenue at night and to avoid the concentration of building entrances on 36th Street.

There were no other speakers and the hearing was closed.

CONSIDERATION

The Commission believes that this special permit (C 070469 ZSM) in conjunction with the related actions for a zoning text amendment (N 070468 ZRM), and special permit (C 070470 ZSM) are appropriate.

Special Permit for Transfer of Floor Area (C 070469 ZSM)

The Commission believes that the proposed floor area transfer will not unduly increase the intensity of the block to the detriment of buildings on that block and on adjacent blocks and that

any disadvantages to the surrounding area caused by a reduced access to light and air will be more than offset by the advantages of the preservation of the landmark. The applicant's proposal provides a streetwall that relates harmoniously with the adjacent landmark, 404 Fifth Avenue, creates a signature retail entrance on the corner of West 36th Street and Fifth Avenue that supports the distinguished retail character of Fifth Avenue, and has a building form that complements the form of the Empire State Building which is two blocks to the south on West 34th Street and Fifth Avenue. In particular, the Commission notes that the height of the proposed base of the building has been established at a line just below the underside of 404 Fifth Avenue's cornice, allowing that portion of the cornice along the south wall of the building to remain.

The Commission understands that a building of similar height, rising with a series of setbacks, could be built in an as-of-right scenario. As explained below in the discussion of the special permit for modifications to height and setback regulations, the Commission recognizes that with the requested setback modifications, the proposed building would correspond to the massing of the nearby Empire State Building and would maintain the streetwall presence of the podium. The Commission also notes that, as a condition to the grant of the special permit for the transfer of development rights under Section 74-79, continued preservation and maintenance of the landmarked Tiffany & Company Building will be ensured through a restrictive declaration.

The Commission recognizes that, while replacing and superseding the prior restrictive declaration from 2003, the current restrictive declaration will incorporate the previous preservation program with enhancements, including additional maintenance work to be performed on the roof and the copper flashing of the Tiffany Building, helping to keep this

building in first class condition and preserving it for the local community and the City as a whole. Additionally, the Commission acknowledges that, in accordance with Section 74-793, a transfer instrument and notice of restrictions will reflect the requested transfer and be submitted to the Commission upon recording.

The Commission notes that on August 30, 2007, the applicant submitted revised plans which reduced the residential floor area from 316,031 square feet to 227,712 square feet and increased the hotel floor area from 156,600 square feet to 229,924 square feet and added 14,996 square feet of office. The amount of retail in the building would remain the same. The Commission notes that because of changing market conditions the applicant sought to include additional hotel rooms in the building. The Commission further notes that these changes do not affect the requested actions.

The Commission notes that the requested modifications to the regulations governing pedestrian access regulations of Section 81-84(a) of the Zoning Resolution and the pedestrian circulation space regulations of Sections 81-45 and 37-07, which modifications are only possible as a result of the requested text amendment discussed below, create a more harmonious relationship with the surrounding landmark buildings and contribute to a better site plan. The Commission recognizes that the design of the proposed building is intended to balance the pedestrian circulation space requirement with the goal of maintaining streetwall continuity. The proposed building has a solid street wall punctuated on its two frontages by a series of five building entrance recess areas in an effort to cohere with the adjacent buildings.

The Commission recognizes that the Fifth Avenue Subdistrict within the Special Midtown District is one of New York's signature attractions. In order to protect, preserve and enhance this concentration of retail-related commerce, the regulations of the Fifth Avenue Subdistrict of the Special Midtown District restrict the location of non-retail entrances. The Commission notes that the as-of-right building would place the hotel and residential tower entrances and loading berth on the side street, and the small retail storefronts on the Fifth Avenue frontage. Such access would result in a hierarchical imbalance in the façade design and would be inconsistent with the patterns in façade treatment observed in nearby landmark structures. The Commission, therefore, believes that the proposed entrance locations would establish a programmatic and architectural balance between the two facades, consistent with the surrounding landmark structures. The Commission further notes that the proposed development, with approximately 28,707 square feet of retail, will complement the retail character of the Fifth Avenue Subdistrict.

Zoning Text Amendment (C 070468 ZRM)

The Commission recognizes that Section 74-79 of the Zoning Resolution currently allows the Commission to grant a narrow range of waivers in connection with the transfer of development rights to adjacent lots from lots occupied by landmark buildings. Additionally, the Commission notes that Section 74-79 of the Zoning Resolution does not permit the modification of any regulations specifically applicable in a special district or subdistrict. Both the Special Midtown District and the Fifth Avenue Subdistrict regulations were enacted many years after the enactment of Section 74-79.

The Commission believes that the proposed text amendment, including changes to Sections 81-212 and 81-81 and new Section 81-85 of the Special Midtown District and Fifth Avenue Subdistrict regulations of the Zoning Resolution, to allow modifications or waivers to mandatory plan elements in the context of a Section 74-79 special permit, is appropriate provided that the finding of Section 81-85 is made.

The Commission notes that the text amendment would only apply within the Fifth Avenue Subdistrict of the Special Midtown District.

Special Permit for Modification of Height & Setback (C 0070470 ZSM)

The Commission notes that a special permit to modify height and setbacks is necessary because the proposed building, including the requested transfer of floor area, encroaches within the half-setback lines and is therefore not in compliance with Section 81-26 of the Zoning Resolution and the daylight evaluation regulations of Section 81-27 of the Zoning Resolution.

The Commission believes that the design of the proposed building complements adjacent landmarks and maintains a considerate relationship with the surrounding streetscape. With its 22.25-foot setback from the streetline, the tower portion of the proposed building is consistent with the rectilinear massing of the surrounding landmarks and the Empire State Building, in particular.

The Commission believes that the tower portion of the proposed building also serves to reinforce the precedent of street-wall buildings and accentuate the statements made in the podium, such as

the entablature and cornice at the top edge of the podium, which are located just below the underside of 404 Fifth Avenue's cornice, and the projecting trim at the upper edge of the street level openings which continue the cornice lines established at 404 Fifth Avenue and the Gorham Building.

The Commission notes that the proposed building would preserve the integrity of the landmark building at 404 Fifth Avenue. It recognizes that an-as-of right location for the proposed tower would conflict with the adjacent landmarked building at 404 Fifth Avenue by cantilevering over it and removing the parapet.

The Commission also believes that the massing of the building helps to preserve the view south on Fifth Avenue to the Empire State building while adding an engaging architectural element to the New York City skyline.

FINDINGS

Based upon the above consideration, the City Planning Commission hereby makes the following findings required by Section 74-792(e):

1. that the permitted transfer of floor area or variations in the front height and setback regulations will not unduly increase the bulk of any new development, density of population or intensity of use in any block to the detriment of the occupants of buildings on the block or nearby blocks, and that any disadvantages to the surrounding area caused

by reduced access of light and air will be more than offset by the advantages of the landmark's preservation to the local community and the City as a whole;

2. that the program for the continuing maintenance will result in the preservation of the landmark; and

3. Not applicable

As well as the following finding required by new Section 81-85:

that the permitted transfer of floor area and modification or waiver of mandatory plan elements will result in a distribution of bulk and arrangement of uses on the zoning lot that relate more harmoniously with surrounding landmark buildings or other structures.

RESOLUTION

RESOLVED, that the City Planning Commission finds that the action described herein will have no significant impact on the environment; and it be further

RESOLVED, by the City Planning Commission, pursuant to Sections 197-c and 201 of the New York Charter, that based on the environmental determination, and the consideration and findings described in this report, the application submitted by 400 Fifth Realty LLC and 401 Fifth LLC pursuant to Sections 197-c and 201 of the New York City Charter for the grant of a special permit pursuant to:

Sections 81-212, 74-79 and 81-85 (new section) to: (1) allow the transfer of 173,692 square feet of floor area from a landmark building; and (2) modify the requirements of

Section 81-84 (Mandatory Regulations and Prohibitions) to allow a hotel lobby within 50 feet of the Fifth Avenue street line and Sections 81-45 (Pedestrian Circulation Space) and 37-07 (Requirements for Pedestrian Circulation Space) to allow a reduction of the amount and dimensional requirements of the required pedestrian circulation space to facilitate the development of a 57-story mixed use building on property located at 400-404 Fifth Avenue (Block 838, Lots 42, 45, 46, 47 and 48), in a C5-3 District, within the Special Midtown District (Fifth Avenue Subdistrict), Borough of Manhattan, Community District 5.

is approved, subject to the following conditions:

- 1) The property that is the subject of this application (C 070469 ZSM) shall be developed in size and arrangement substantially in accordance with the dimensions, specifications and zoning computations indicated on the following plans, prepared by Gwathemey Siegel Architects, filed with this application and incorporated in this resolution:

| <u>Drawing No.</u> | <u>Title</u> | <u>Last Date Revised</u> |
|--------------------|---------------------------------------|--------------------------|
| Z-001 | Zoning Site and Calculations | 8/29/07 |
| Z-002 | Zoning Applicability and Yard Diagram | 5/09/07 |
| Z-004 | Building Sections | 8/29/07 |
| Z-006 | Pedestrian Circulation Space | 8/29/07 |
| Z-007 | Streetwall Continuity. | 5/09/07 |
| | Major Entrances & Retail Continuity | |
| Z-008 | Daylight Evaluation Site Plan | 5/09/07 |
| Z-009 | Daylight Evaluation 36th Street | 5/09/07 |
| Z-010 | Daylight Evaluation 5th Avenue | 5/09/07 |
| Z-011 | Daylight Evaluation 37th Street | 5/09/07 |

- 2) Such development shall conform to all applicable provisions of the Zoning Resolution, except for the modifications specifically granted in this resolution and shown on the plans listed above which have been filed with this application. All zoning computations are

subject to verification and approval by the New York City Department of Buildings.

- 3) Such development shall conform to all applicable laws and regulations relating to its construction, operation and maintenance.
- 4) All leases, subleases, or other agreements for use or occupancy of space at the subject property shall give actual notice of this special permit to the lessee, sublessee or occupant.
- 5) Development pursuant to this resolution shall be allowed only after the restrictive declaration dated September 19, 2007, executed by 401 Fifth LLC, and the restrictive declaration dated September 19, 2007, executed by 400 Fifth Realty LLC and 404 Fifth LLC, the terms of which are hereby incorporated into this resolution, shall have been recorded and filed in the Office of the City Register of the City of New York, County of New York.
- 6) Upon the failure of any party having any right, title or interest in the property that is the subject of this application, or the failure of any heir, successor, assign, or legal representative of such party, to observe any of the covenants, restrictions, agreements, terms or conditions of this resolution and the attached restrictive declaration whose provisions shall constitute conditions of the special permit hereby granted, the City Planning Commission may, without the consent of any other party, revoke any portion of or all of said special permit. Such power of revocation shall be in addition to and not limited to any other powers of the City Planning Commission, or of any other agency of government, or any private person or entity. Any such failure as stated above, or any alteration in the development that is the subject of this application that departs from any of the conditions listed above, is grounds for the City Planning Commission or the City

Council, as applicable, to disapprove any application for modification, cancellation or amendment of the special permit hereby granted or of the attached restrictive declaration.

- 7) Neither the City of New York nor its employees or agents shall have any liability for money damages by reason of the city's or such employee's or agent's failure to act in accordance with the provisions of this special permit.

The above resolution (C 070469 ZSM), duly adopted by the City Planning Commission on September 19, 2007 (Calendar No. 15), is filed with the Office of the Speaker, City Council, and the Borough President in accordance with the requirements of Section 197-d of the New York City Charter.

AMANDA M. BURDEN, AICP, Chair

KENNETH J. KNUCKLES, Esq., Vice Chairman

**ANGELA M. BATTAGLIA, IRWIN G. CANTOR, P.E., ANGELA R. CAVALUZZI, R.A.,
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NATHAN LEVENTHAL, JOHN MEROLO, DOLLY WILLIAMS, Commissioners**