

960-67-BZ & 116-68-BZ

APPLICANT – Akerman LLP By Steven Sinacori for 40 CPS Associates, LLC, owner.

SUBJECT – Application December 26, 2013 – Amendment of two previously approved variances (§72-21) to allow the merger of the zoning lots and the transfer of development rights from 36 to 40 Central Park South. R10-H zoning district.

PREMISES AFFECTED – 36 & 40 Central Park South, South side of Central Park South between 6th and 5th Avenues. Block 1274, Lot(s) 6, 11, Borough of Manhattan.

COMMUNITY BOARD #5M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....4

Negative:.....0

Absent: Vice Chair Collins.....1

THE RESOLUTION –

WHEREAS, this is an application for a reopening and an amendment to two existing variances, to allow (1) the merger of Lot 6 and Lot 11 into a single zoning lot; (2) the potential transfer of unused development rights from Lot 6 to Lot 11; and (3) an amendment to the site plan to reflect the proposed merger of Lot 6 and Lot 11; and

WHEREAS, a public hearing was held on this application on March 25, 2014, after due notice by publication in *The City Record*, and then to decision on April 8, 2014; and

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

WHEREAS, Community Board 5, Manhattan, recommends approval of this application on the condition that the applicant’s Inclusionary Housing development partner appear before it; any future modifications are presented to it and the Board of Standards and Appeals; and the applicant will discuss design with it; and

WHEREAS, the application is brought on behalf of the owners of Lot 6 (the “Lot 6 Owner”) and Lot 11 (the “Lot 11 Owner”) (collectively, “the applicants”); and

WHEREAS, Lot 6 (which includes a 40 Central Park South building and a 41 West 58th Street building) is a through block site located partially within an R10H zoning district, partially within a C5-1 zoning district, and partially within a C5-2.5(MiD) zoning district; and

WHEREAS, on June 25, 1968, pursuant to BSA Cal. No. 116-68-BZ, the Board granted a variance for Lot 6 (the “Lot 6 Variance”) that allowed an existing professional office located on a portion of the first floor of a 21-story building in what was then an R10 zoning district to be converted to an eating and drinking establishment; the restaurant use is located entirely within the building at 40 Central Park South; and

WHEREAS, on December 21, 1999, the Board approved an amendment of the variance to permit the enlargement of the eating and drinking establishment; and

WHEREAS, Lot 6 has a lot area of 25,607.1 sq. ft., 125 feet of frontage on Central Park South, and 130 feet of frontage on West 58th Street; it is occupied by two residential buildings: 41 West 58th Street, located on the southern portion of the site, and 40 Central Park South, located on the northern portion of the site; and

WHEREAS, the Lot 6 Owner states that the combined floor area for the two buildings on Lot 6 is 251,816 sq. ft. and that there are 4,255 sq. ft. of unused floor area under the applicable maximum 10.0 FAR 51,214 sq. ft. of additional unused floor area available through the Inclusionary Housing program; and

WHEREAS, accordingly, the Lot 6 Owner represents that there is a potential for a total of 55,469 additional sq. ft. of floor area available on Lot 6; and

WHEREAS, Lot 11, which currently constitutes a separate zoning lot, is a through block site partially within an R10H zoning district and partially within a C5-2.5(MiD) district; and

WHEREAS, on November 13, 1968, at which time Lot 11 was located partially within an R10 zoning district and partially within a C5-3 zoning district, pursuant to BSA Cal. No. 960-67-BZ, the Board granted a variance of the applicable use and bulk regulation for the Lot 11 building (the “Lot 11 Building”) to allow transient hotel use within the R10 zoning district and to allow waivers to FAR, rear yard, and sky exposure plane regulations along Central Park South and West 58th Street; and

WHEREAS, the Board approved three amendments in the 1970s and 1980s, which allowed for massing reconfiguration, the enlargement of the banquet hall, and the enclosure of the rooftop recreation area; and

WHEREAS, Lot 11 has a lot area of 20,284.8 sq. ft. with 75 feet of frontage on Central Park South and 127 feet of frontage on West 58th Street; it is occupied by a 44-story transient hotel; and

WHEREAS, the Lot 11 Owner states that the R10H portion of Lot 11 is subject to a base 10.0 FAR, which may be increased to 12.0 FAR through the Inclusionary Housing program; the C5-2.5(MiD) portion of Lot 11 is subject to a maximum 12.0 FAR; and

WHEREAS, the Lot 11 Owner asserts that under current zoning, Lot 11 may be developed with up to 243,418 sq. ft. of floor area; and

WHEREAS, pursuant to the Board’s approval, the Lot 11 Building contains 369,558 sq. ft. of floor area, which exceeds the amount of floor area currently permitted on Lot 11 by 126,140 sq. ft.; and

WHEREAS, the Lot 11 Owner states that there are 14,297 sq. ft. of unused floor area under on Lot 6 (if tenant recreation space is included per ZR § 81-241) and 41,172 sq. ft. of additional unused floor area available through the Inclusionary Housing program (per ZR § 23-951); and

WHEREAS, the applicants now seek the Board’s consent to merge Lot 6 and Lot 11 into a single zoning lot, which would allow for the transfer of excess development rights from Lot 6 to Lot 11; and

WHEREAS, the applicants seek authorization to ultimately transfer up to 55,469 sq. ft. of unused development rights (provided the recreation space and Inclusionary Housing requirements are satisfied) from

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Lot 6 to adjacent Lot 11; and

WHEREAS, the applicants also propose to modify the site plan to reflect the merger of Lots 6 and 11 within the subject zoning lot; and

WHEREAS, the applicants represent that the proposed zoning lot merger and floor area transfer will not have any effect on the existing buildings located on Lot 6 or on the operation of the eating and drinking establishments therein; and

WHEREAS, the applicants assert that a transfer of the unused floor area from Lot 6 should be allowed because it is not in conflict with the Lot 6 Variance; and

WHEREAS, the applicants represent that the proposed transfer of development rights is consistent with the Court's decision in Bella Vista v. Bennett, 89 N.Y. 2d 565 (1997), setting forth the parameters of Board review of requests for the transfer of development rights from sites for which a variance has been granted; and

WHEREAS, the applicants state that its application for the original 1968 variance and 1999 amendment for Lot 6 reflect that the unused development rights were not assumed or considered in the Board's analysis; and

WHEREAS, the applicants state that the documents in support of the original variance discuss only the economics of the ground floor space that was subject to the variance, specifically its limited utility and value as a professional office and its significantly greater value for a restaurant use; and

WHEREAS, the applicants state that the submissions associated with the 1999 amendment to the Lot 6 Variance analyze the economic viability of the existing Lot 6 buildings with and without the proposed expansion of the restaurant use but are silent on the potential use and value of Lot 6's unused development rights; and

WHEREAS, the applicants assert that at the time of the 1968 Lot 6 Variance and 1999 amendment, there would have been little demand for, and accordingly virtually no value in, Lot 6's unused development rights; and

WHEREAS, further, the applicants note that at all relevant times, the subject block (Block 1274) was fully developed with substantial buildings and the buildings on Lot 6 were full occupied with residential use; and

WHEREAS, specifically, the applicants note that Lot 6 was adjacent to the 44-story Park Lane Hotel to the east, developed in the late 1960's pursuant to a Board variance which included a floor area waiver; and adjacent to the 35-story Hotel St. Moritz and a ten-story residential condominium to the west; and

WHEREAS, accordingly, the applicants assert that at the time of the Board's prior approvals, there were no viable receiving sites for Lot 6's unused development rights and, consequently, they had little if any value; and

WHEREAS, the applicants assert that the historic records and market conditions support the conclusion that the unused development rights were not considered by the Board in its determination that the 1968 variance was the minimum necessary to resolve the economic hardship on the site; and

WHEREAS, the applicants state that an approval of

the requested development rights transfer from the subject site does not undermine the integrity of the Board's earlier findings concerning ZR §§ 72-21(b) or 72-21(e) because the facts of the instant application are readily distinguishable from those underlying the Court's holding in Bella Vista; and

WHEREAS, the applicants conclude that the use of the development rights as a result of the proposed zoning lot merger is therefore not inconsistent with the Board's prior approvals; and

WHEREAS, the Board notes that Bella Vista concerned a permit request for a new as-of-right residential building proposed to be built through the transfer of development rights-- from a site in which the Board granted a use variance to permit operation of a movie theater in a residential zoning district, to a separate adjacent site under common ownership-- for development of a complying residential building; and

WHEREAS, the Court held that review and approval of such transfers by the Board was required, inter alia, because the basis for the original grant, particularly with respect to the findings of financial hardship under ZR § 72-21(b) and minimum variance needed to provide relief under ZR § 72-21(e), may be implicated by the proposed transfer; and

WHEREAS, the Board notes that, unlike in Bella Vista, Lot 6 and the receiving development site (Lot 11) have been under separate, unrelated ownership since at least the time of the Board's 1968 grant and the owner of the variance site therefore lacked control over either the timing of new development on the adjacent property or the use of the development rights for such a development; and

WHEREAS, the Board also notes that a brief period of time elapsed between the date of the Bella Vista variance grant and the date of the subsequent permit application which also distinguishes that case from the proposed development rights transfer under review in the subject application; and

WHEREAS, the Board notes that in Bella Vista, the permit application proposing to use floor area transferred from the variance site was filed only three years after the Board grant, while the variance for the subject site was granted in 1968, 45 years before the filing of the instant application; and

WHEREAS, the Board agrees that the differences in timing and in the health of the respective real estate markets distinguish the Bella Vista case from the instant case and supports the conclusion that the use of Lot 6's unused development rights was not foreseeable by the Lot 6 Owner or the Board; and

WHEREAS, the Board also notes that the 1968 variance was for the conversion of a portion of the first floor of one of two buildings on a zoning lot from one non-conforming use to another non-conforming use, which represents a relatively small portion of the zoning lot, occupied by two buildings and more than 250,000 sq. ft. of floor area, that is subject to the variance; and

WHEREAS, the Board finds that the proposed transfer of development rights does not implicate or affect the basis for its findings in general, and specifically the (b) and (e) finding, at the time that they

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were made; and

WHEREAS, the Board agrees that the unused development rights were not considered in its analysis for the Lot 6 Variance and 1999 amendment and, thus, does not find that the future use of those rights disturbs the Board's prior approvals; and

WHEREAS, the Lot 11 Owner states that there is not yet a decision regarding a future development of Lot 11 and is considering: (1) the continued use of the Lot 11 Building as a transient hotel pursuant to the existing variance; (2) conversion of a portion of the Lot 11 Building to residential use, which would require approval from the Board; and (3) a surrender of the variance on Lot 11 and the construction of a new building in accordance with the current zoning regulations, which might use excess development rights available on Lot 6; and

WHEREAS, the applicant states that regardless of the plan to proceed, the Lot 11 Building will continue to be used as a transient hotel pursuant to the variance for some period of time and that, due to the fact that it is currently overbuilt as to floor area, no transfer of unused development rights from Lot 6 will be possible without other changes to or demolition of the Lot 11 Building; and

WHEREAS, the Board notes that the Lot 6 Owner does not propose any alteration to the building or use at 40 Central Park South and, thus, Lot 6 will continue to operate in accordance with the Board-approved plans and the conditions of its grant; and

WHEREAS, as to Lot 11, the Lot 11 Owner acknowledges that notwithstanding the Board's consent to a zoning lot merger and floor area transfer from Lot 6, any changes to the Lot 11 Building require prior approval from the Board as either (1) acceptance of a surrender of the Lot 11 variance; (2) amendment to the Lot 11 variance; or (3) a new variance; and

WHEREAS, the Board notes that it does not take any position on the floor area calculations, which are subject to DOB review and approval, and that any changes to Lot 6 or Lot 11 are subject to the Board's review and approval; and

WHEREAS, the Board notes that even if the Lot 11 Owner ultimately demolishes the Lot 11 Building and surrenders the Lot 11 variance, as a single zoning lot, Lot 6 and Lot 11 remain under the Board's jurisdiction; and

WHEREAS, the Board notes that, by this amendment to BSA Cal Nos. 960-67-BZ and 116-68-BZ, it does not approve an amount of floor area available for transfer or allocated to each site; and

WHEREAS, at hearing, the Board asked the Lot 11 Owner to clarify its floor area calculations for Lot 6

and the Lot 11 Owner confirmed that there are 307,285 sq. ft. available to Lot 6, including an Inclusionary Housing bonus (205,860 sq. ft. on the R10H/C5-1 portion of the site without the bonus; 41,172 sq. ft. of bonus; and 60,253 sq. ft. on the C5-2.5 sq. ft. where the bonus is not available); and

WHEREAS, the Lot 11 Owner represents that after the 251,816 sq. ft. of floor area associated with the Lot 6 buildings is subtracted from 307,285 sq. ft., there are 55,469 sq. ft. of unused development rights; and

WHEREAS, the Board notes that the respective fee owners of Lot 6 and Lot 11 authorized the application; and

WHEREAS, based upon its review of the record, the Board does not object to the proposed increase in the size of the zoning lot and associated modification of the site plan; and

WHEREAS, additionally, the Board does not object to a transfer of unused development rights from Lot 6 to Lot 11, subsequent to the proposed zoning lot merger, but notes that any further changes to Lot 6 and Lot 11 that are inconsistent with prior approvals are subject to the Board's review and approval.

Therefore it is Resolved, that the Board of Standards and Appeals reopens and amends the resolutions, having been adopted on June 25, 1968 and November 13, 1968, so that as amended this portion of the resolutions shall read: "to permit the merger of Lot 6 and Lot 11, to permit the associated modifications to the BSA-approved site plan, and to consent to a future transfer of development rights from Lot 6 and Lot 11, *on condition* that all site conditions will comply with drawings marked 'Received April 1, 2014' - (1) sheet; and *on further condition*:

THAT the zoning calculations, including any transfer of development rights, are subject to DOB's review and approval and must be in full compliance with underlying bulk regulations;

THAT any modifications to the individual Lot 6 or Lot 11 or to the future merged zoning lot remain subject to the Board's jurisdiction;

THAT all conditions from the prior resolution not specifically waived by the Board will remain in effect;

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, April 8, 2014.

A true copy of resolution adopted by the Board of Standards and Appeals, April 8, 2014.

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**Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.**

