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December 12<sup>th</sup>, 2017

Hon. Margery Perlmutter, Chair  
Board of Standards and Appeals  
250 Broadway, 29th Floor  
New York, NY 10007

**Re: BSA Application for Variance for 128 West 26<sup>th</sup> Street**

Dear Chair Perlmutter:

On the recommendation of its Chelsea Land Use Committee, and after a duly noticed public hearing at the regular Board meeting on December 6, 2017, Manhattan Community Board No. 4 (CB4), by a vote of 44 in favor, 0 opposed, 0 abstaining and 0 present but not eligible to vote, voted to recommend denial of an application under ZR 72-21 to permit the development of a 14-story mixed-use building with ground floor commercial and residential above in an M1-6 district which does not permit residential uses. If the Board of Standards and Appeals (BSA) approves this variance despite our recommendation, CB4 recommends a lower building height, no balconies and measures to safeguard the adjacent building at 130 West 26<sup>th</sup> Street.

**Background**

The site is on Block 801, Lot 58, which had been improved with a five-story commercial building with a height of 55 feet. In 2015 the Department of Buildings (DOB) issued a Vacate Order because the building was deemed unsafe to occupy. It had been damaged due to excavation work performed at 132 West 26<sup>th</sup> Street which caused significant movement and settlement.

The subject building had been restrained by the adjacent building at 130 West 26<sup>th</sup> Street. The construction at 132 West 26<sup>th</sup> Street created a deeper foundation than the neighboring building at 130 West 26<sup>th</sup> Street, causing that building to shift, tilt and settle so the restraint mechanism at 130 West 26<sup>th</sup> Street had to be removed. As a result, the subject building shifted and a large gap opened between 128 West 26<sup>th</sup> Street and the neighboring building at 130 West 26<sup>th</sup> Street. The subject building had unreinforced exterior masonry walls and timber joists that have shifted so much that they no longer hold up the walls.

The adjacent residential building at 130 West 26<sup>th</sup> Street is a cooperative and continues to be occupied. A bicycle shop is on the ground floor. That building has steel joists and has better withstood the faulty underpinning performed by the contractors at 132 West 26<sup>th</sup> Street. However 130 West 26<sup>th</sup> Street has also been severely damaged according to DOB, is leaning and is held in place by cross-lot bracing. The

City is requiring that the vault in the basement be repaired. While it is believed that the underpinning for 130 West 26<sup>th</sup> Street has been corrected, the building is still leaning approximately nine inches westward and one inch northward. It is unclear how much more remedial work needs to be performed to permanently stabilize the building.

### **The Proposal**

The existing building at 128 West 26<sup>th</sup> Street would be demolished and replaced by a 14-story building with ground floor commercial and residences above with a cellar, a 30-foot rear yard and no front setback. The new building would rise to 148 feet with one two bedroom residential unit per floor, each with a 12 foot by 7 foot balcony. The FAR would be 10 as permitted by the existing M1-6 FAR.

The requested actions include waivers of:

1. Use regulations – residential instead of manufacturing and/or commercial uses
2. Wall/setback regulations of the M1-6 district which requires a 20 foot front wall setback above 85 feet or six stories.

### **Required Zoning Resolution Section 72-21 Findings**

The applicant must meet the following five findings for BSA to grant a variance in the application of ZR Section 42-00.

(a) Uniqueness

BSA requires that the site exhibit unique physical conditions that create a hardship.

According to the applicant it is infeasible to develop the site with as-of-right development because of the severe physical damage on the site and the narrowness of the site. As described above, the site has shifted due to excavation on a nearby lot, causing the building supports to no longer hold up the walls, resulting in DOB issuing a vacate order.

In addition the applicant contends that the 25-foot lot size, combined with the damage the site has experienced, makes as-of-right development impossible. Applicant cites several BSA approvals of similar sites in the neighborhood based on the obsolescence of the existing buildings.

(b) Financial Hardship

The applicant must show that the proposed variance is necessary to realize a reasonable return from development on the lot.

The applicant's Economic Analysis describes an as-of-right commercial building that would result in a financial loss because the development costs would not provide a reasonable return. An engineering report notes that to stabilize the building with new structural supports would be cost-prohibitive and would result in a building with unusable spaces.

The analysis shows that the proposed project would provide a modest return of 5.7percent.

(c) Character of the Neighborhood

The variance must not alter the character of the neighborhood.

The applicant argues that the proposed project would be consistent with the surrounding neighborhood which has a mix of commercial and residential buildings that rise without the required set back and are at comparable heights.

(d) Self-Created Hardship

The owner must not have created the hardship. The purchase of a lot subject to the restrictions sought to be varied shall not constitute a self-created hardship.

The applicant claims that the damaged building and the existing zoning regulations were not self-created.

(e) Minimum Variance

The variance must be the minimum necessary to afford relief.

The applicant contends that the proposed project is the minimum to achieve a reasonable return.

**CB4 Analysis of the ZR 72-21 Findings**

(a) **Unique Site Conditions**

There is ample evidence, including the DOB Vacate Order, that the building on the site is severely damaged, an unfortunate condition but on its own is not unique. Similarly the narrowness and small size of the lot do not present a unique condition.

We question the applicant's conclusion that this finding has been met.

(b) & (e) **Reasonable Return and Minimum Variance**

We question some of the Economic Analysis's assumptions and conclusions. However, as we have in the past, we defer to BSA's expertise in determining whether the applicant has truly demonstrated that the proposed waiver is the minimum necessary for the applicant to earn a reasonable return. We note that while the applicant characterizes a 5.7 return as "modest" it is actually quite impressive in the current interest rate climate. We request that BSA tell us what they consider a reasonable return on the proposed project.

In particular, we ask that the assumptions behind the analysis of a new as-of-right commercial building be examined carefully.

(c) **Character of the Neighborhood**

The neighborhood, as the applicant explains, is indeed a mix of commercial and residential uses. The proposed residential building with ground floor commercial would not be disruptive.

The height of the building however is not consistent with the mid-block building heights on both sides of the social block. The applicant justifies the proposed 148 foot height by identifying the heights of buildings at the end of the block near or at 6<sup>th</sup> and 7<sup>th</sup> Avenues. If these buildings are excluded from the analysis, we see that six buildings are seven stories or lower, two are nine to eleven stories, six are 12 stories and one (a hotel) is 23 stories. To be consistent with the mid-block character, the proposed building should be limited to 125 feet or 12 stories.

The proposed absence of the front set back in the proposed building is consistent with all the buildings on the block which do not have the required M1-6 setback except for the hotel which is setback.

(d) **Self-Created Hardship**

The current owner bought the site after the DOB vacate order was issued but BSA does not consider that to be a self-created hardship. We believe that this is absurd. If the applicant had purchased the

premises knowing that a use variance was unlikely, he would have negotiated a lower price that would have permitted a reasonable rate of return with an as-of-right building.

In addition, the former owner is in litigation with the owner of 132 West 26<sup>th</sup> Street over the damage caused to 128 West 26<sup>th</sup> Street when he owned it. The applicant says he is not a party to the litigation, but he did not say that he does not stand to benefit from the litigation, e.g. through an agreement with the previous owner. We ask BSA to clarify this and modify the financial analysis as appropriate.

#### **CB4 Recommendation**

##### CB4 recommends disapproval of the proposed variance.

CB4 questions whether the proposed project is the minimum variance necessary to afford relief and finds that the proposed 14-story building height is inconsistent with the existing mid-block building heights. We believe the real estate market is so robust in Chelsea that the applicant could earn a reasonable return with a shorter building.

We also request additional safe guards to ensure the stability of the adjacent damaged building at 130 West 26<sup>th</sup> Street. The design of the proposed building should be modified to ensure the quality of life of residents living at 130 West 26<sup>th</sup> Street.

*If BSA approves this variance, CB4 recommends the following:*

##### Proposed building

1. The new building should have a maximum height of 125 feet, or approximately 12 stories, to be consistent with mid-block building heights.
2. Rear balconies should not be included in the project to minimize noise disturbance to nearby residents, including the adjacent building at 130 West 26<sup>th</sup> Street and the 12-story facility for homeless people at 127 West 25<sup>th</sup> Street behind the 128 West 26<sup>th</sup> Street site. The facility's rooms face the rear of 128 West 26<sup>th</sup> Street.
3. If a roof deck is provided, it should be for the use of 128 West 26<sup>th</sup> Street residents only. No food or liquor-serving establishments should be permitted to use the roof deck.
4. No restaurants or liquor-serving uses should occupy the ground floor commercial space.
5. During construction of the new building, there should be no permits for after-hours or weekend work except in the event of an emergency. Residents at 130 West 26<sup>th</sup> Street and the staff at 127 West 25<sup>th</sup> Street should be immediately notified prior to such a request to DOB.

##### Safety and Structural Integrity Measures

1. Demolition of 128 West 26<sup>th</sup> Street and construction plans for the three adjoining sites (128, 130 and 132 West 26<sup>th</sup> Street) should be closely coordinated. Building owners/contractors should have regular communication including:
  - a. Contact point person for 128 West 26<sup>th</sup> Street development; if necessary contact information for engineers and contractors.

- b. Submissions to DOB and changes to submissions.
  - c. Prior to demolition of 128 West 26<sup>th</sup> Street: clarification of whether or not underpinning will be necessary; correct seismic space between buildings; protection of 130 West 26<sup>th</sup> Street roof.
2. Monitoring and documentation of 130 West 26<sup>th</sup> Street during demolition and construction at 128 West 26<sup>th</sup> Street including:
    - a. Crack monitors for 130 West 26<sup>th</sup> Street
    - b. Vibration monitors in basement of 130 West 26<sup>th</sup> Street.
  3. Provision of full insurance protection to 130 West 26<sup>th</sup> Street before demolition at the 128 West 26<sup>th</sup> Street site, as well as a commitment to cover damages to 130 West 26<sup>th</sup> Street caused by construction.

Sincerely,



Delores Rubin  
Chair  
Manhattan Community Board 4



John Lee Compton, Co-Chair  
Chelsea Land Use Committee



Betty Mackintosh, Co-Chair  
Chelsea Land Use Committee

- cc:
- Maria Torres-Springer, Commissioner, NYC HPD
  - Martin Rebholz, Manhattan Borough Commissioner, NYC DOB
  - Hon. Gale A. Brewer, Manhattan Borough President
  - Hon. Corey Johnson, City Council
  - Jack Ancona, Owner, 132 West 26<sup>th</sup> Street
  - Steve Ancona, Property Manager, 132 West 26<sup>th</sup> Street
  - Andrew Liptez, Wasserman Grubin & Rogers, LLP  
Attorney for 130 West 26<sup>th</sup> Street
  - Jay Goldstein, Esq.  
Attorney for 128 West 26<sup>th</sup> Street