

1997 WL 34846670 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
New York County

In the Matter of the Application of TWO EAST NINETY EIGHTH STREET, INC. (a/k/
a 1165 Fifth Avenue), Nina Lihn, David Lihn, Joyce Lewis and Wright B. Lewis, Petitioners,
v.

BOARD OF STANDARDS and Appeals of the City of New York consisting of Gaston Silva,
Robert E. Flahive, Rosemary F. Palladino, Cecil P. Joseph and James Chin, Respondent,
and
Bernard's School, Inc., Intervenor-Respondent.

No. 109380/96.
April 30, 1997.

Patricia Anne Williams, Judge.

Article 78

Proceeding

PATRICIA ANNE WILLIAMS, J.S.C.

Petitioners commenced this Article 78 proceeding seeking an order of this Court annulling the determination of the Respondent, Board of Standards and Appeals of the City of New York (the "BSA") granting a special permit to Intervenor-Respondent, St. Bernard's School (the "School"), a private elementary school for boys. The special permit at issue allows the School to exceed the height and setback requirements for the zoning districts in which it is located (R9 and R7-2). Specifically, the special permit allows the School to enlarge its existing four and one-half story building located at 4 East 98th Street by adding two and one-half floors of additional space, consisting of a total of 21,732 square feet.

Petitioners are shareholders in a 14-story co-operative apartment building (the "Co-op") located at 2 East 98th Street (also referred to as 1165 Fifth Avenue). The Co-op is a corner building situated immediately adjacent to the School on its westerly border. The western 25 feet of the School's frontage share the Co-op's R9 zoning district while the remaining 100 feet of the frontage are located in an R7-2 district. The School is also located adjacent to the Expanded Carnegie Hill Historic District - a landmark preservation area.

The School filed a request/application for the special permit on or about October 24, 1995. Thereafter, representatives of the School met with various neighborhood groups and advised them of their planned expansion. The parties to the instant proceeding made numerous submissions to the BSA. Public hearings were held before the BSA on February 27, 1996 and March 26, 1996. Following the hearings and after a review of the various submissions, the BSA unanimously passed a resolution on April 23, 1996 granting the special permit to the School. The instant petition followed as did Answers, Replies, Sur-Replies, and so on.

Essentially, this dispute principally concerns the loss, by bricking up, of three lot line windows on the 6th through 11th floors of the Co-op. Petitioners concede that of the total number of 13 or 15 lot line windows affected¹, all but three would be bricked up "as a matter of right" if the School were to build within the required setbacks (in which case, no special permit would be

required). However, petitioners do not contest the School's claim that such a method of construction would be more expensive, result in a taller structure and therefore less light to *all* side windows of the Co-op. They do contend that the BSA's determination must be annulled as illegal, arbitrary and capricious because, 1) the BSA failed to adhere to New York City Charter, § 668 when it did not forward a correction to the School's application to the Community Board, 2) the BSA failed to comply with Zoning Resolution ("ZR") § 73-641(b) and (c), 3) the BSA violated ZR § 73-641(b) and (c) when it did not look behind the School's justifications for the enlargement, 4) the BSA erroneously considered, as a controlling consideration for the special permit, the overall impact on the public's welfare, 5) the BSA erred in not first requiring the School to increase the height and area of its structure as a matter of right as a pre-condition to granting a special permit, and 6) the BSA failed to consider the negative impact upon the community at large should the special permit be granted.

On March 11, 1997, nearly ten months after the Petition was filed, Petitioners moved, by Order to Show Cause, for leave to amend the petition. Respondents have opposed the application. For the reasons set forth below, that motion is denied and the petition is dismissed in its entirety.

STANDARD OF REVIEW

The determination of an administrative agency, such as the Board of Standards and Appeals, will be upheld if it is supported by substantial evidence in the entire record before the agency at the time the decision was made. CPLR § 7803(4). The concept of substantial evidence "involves a weighing of the quality and quantity of the proof". *300 Gramatan Avenue Associates v. State Division of Human Rights*, 45 N.Y.2d 176, 180, 408 N.Y.S.2d 54 (1978). As the Court of Appeals has stated, substantial evidence is "more than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt". *Id.* at 180-181. Thus, the task of a reviewing court is to determine, from the whole record, whether there is a "rational basis in [the record] for the findings of fact supporting the agency's decision" *Id.* at 182; *Sasso v. Osgood*, 86 N.Y.2d 374, 633 N.Y.S.2d 259 (1995). "Moreover, if not irrational or unreasonable, the interpretation and construction given statutes by the body responsible for their administration should be upheld". *Christina Holding Corp. v. Silva*, 231 A.D.2d 519, 647 N.Y.S.2d 100 (2nd Dept. 1996).

THE NATURE OF SPECIAL USE PERMITS

The purpose of the special permit is to bring flexibility to municipal programs of land-use controls, and discretion has been placed in boards of zoning appeals to determine whether special permits should be granted or denied. Anderson, Robert, M., 2 *New York Zoning Law & Practice, 3rd Edition*, § 24.15. The nature of the special permit and the pre-requisites for its issuance have been contrasted with those underlying a variance. Thus, a special permit pertains to a use which is authorized as long as certain conditions are satisfied. However, a variance represents a departure from the uses which are authorized by the zoning resolution. Thus, the issuance of a special permit is a duty imposed upon the zoning board once it is shown that the proposed use meet the standards prescribed by the ordinance. A variance, on the other hand, will only be issued "upon unique circumstances and a showing of hardship". *Highpoint Enterprises, Inc. v. Board of Estimate of the City of New York*, 67 A.D.2d 914, 413 N.Y.S.2d 155, *aff'd*, 47 N.Y.2d 935, 419 N.Y.S.2d 969 (1979). "The inclusion of the permitted use in the ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood". *Matter of Lee Realty Co. v. Village of Spring Valley*, 61 N.Y.2d 892, 474 N.Y.S.2d 475 (1984). *See also*, *Highpoint Enterprises, Inc. v. Board of Estimate of the City of New York*, *supra*, 67 A.D.2d 914, 413 N.Y.S.2d 115 (2nd Dept. 1979).²

The board must, however, apply the standards articulated in the applicable ordinance. *Rich v. Zoning Board of Appeals*, 53 A.D.2d 672, 384 N.Y.S.2d 862 (2nd Dept. 1976). Compliance with those standards must be shown before any permit can be

granted. *Brick Hill Construction Corp. v. Zoning Board of Appeals of the Town of Somers*, 74 A.D.2d 810, 425 N.Y.S.2d 516, *aff'd*, 53 N.Y.2d 621, 438 N.Y.S.2d 776 (1980). The issuance of a special permit "is a duty which must be exercised whenever there is compliance with the statutory conditions". *Peter Pan Games of Bayside, Ltd. v. Board of Estimate of the City of New York*, 67 A.D.2d 925, 926, 413 N.Y.S.2d 164, 166 (2nd Dept. 1979) (citing *Knight v. Bodkin*, 41 A.D.2d 413, 344 N.Y.S.2d 170); *Roginski v. Rose*, 63 N.Y.2d 735, 480 N.Y.S.2d 206 (1984); *Valley Home Construction, Ltd. v. Van Wagner*, 53 A.D.2d 863, 385 N.Y.S.2d 353, *aff'd*, 41 N.Y.2d 1028, 395 N.Y.S.2d 631 (1977); *Walworth Leasing Corp. v. Sterni*, 64 Misc.2d 940, 944, 316 N.Y.S.2d 851 (Wayne Cty. 1970) ("Since the application...was under a so-called 'special permit', provision of the ordinance, and the petitioner had amply demonstrated its intention and ability to comply with all the conditions imposed by the ordinance upon the granting of such a special permit, the Board had no discretion except to grant the permit"). Thus, the burden of proof on an applicant for a special permit is far less stringent than that required for a variance. *J.P.M. Properties v. Town of Oyster Bay*, 204 A.D.2d 722, 612 N.Y.S.2d 634, *app. den.*, 84 N.Y.2d 811, 622 N.Y.S.2d 914 (1994); *Highpoint Enterprises v. Board of Estimate of the City of New York*, *supra*, 67 A.D.2d at 915.

THE APPLICABLE ORDINANCES

Zoning Resolution § 73-03(a)

ZR § 73-03 is entitled "General Findings Required for All Special Permit Uses and Modifications". § 73-03(a) requires the BSA to make all of the findings required in the applicable sections of Chapter 3 for, *inter alia*, each special permit use or modification of use. The remainder of that section requires the BSA to make the following findings:

under the conditions and safeguards imposed, the hazards or disadvantages to the community at large of such special permit use or modification of use.. at the particular site are outweighed by the advantages to be derived by the community by the grant of such special permit. In each case the Board shall determine that the adverse effect, if any, on the privacy, quiet, light, and air in the neighborhood of such special permit use or modification of use... will be minimized by appropriate conditions governing location of the site, design, and method of operation.

Zoning Resolution § 73-641

ZR § 73-641(a) requires the BSA to find:

that such modification is required in order to enable such use to provide an essential service to the community.

ZR § 73-641(b) and (c) provide, in relevant part, that the BSA must find:

(b) that without such modification there is no way to design and construct the new buildings or enlargements in satisfactory physical relationships to the existing buildings which are to remain upon the site, so as to produce an integrated development...

(c) that such modification is the minimum modification necessary to permit the development of such integrated community facility, and thereby creates the least detriment to the character of the neighborhood and the use of nearby zoning lots.

DISCUSSION

A. The BSA Did Not Violate § 668 of the New York City Charter

Petitioners' first claim is based, not on the state's zoning regulations, but on an alleged violation of the New York City Charter, specifically § 668(a)(1) and (a)(5). Those provisions require the BSA to forward a copy of every application for a special permit, as well as any additional documents submitted thereafter, to the appropriate community board. Petitioners claim that the BSA failed to adhere to § 668 by failing to forward, not the original application by the School for a special permit, but a correction to that application to Community Board 11.

The record indicates that on March 15, 1996, the BSA received a letter, dated March 13, 1995³, from Vandor & Vandor, the School's planning and urban design consultants. The letter indicated that the original application for a special permit had contained an error in its negative response to question number 7 in Part II, Section B, since the School's property was located adjacent to the "Expanded Carnegie Hill Historic District".⁴ While the letter was addressed to the Director of Environmental Review at the BSA, copies were forwarded to Community Board 11 and petitioners' counsel among others.

It is readily apparent that the purpose of the portions of § 668 relied upon by petitioners is to ensure that notice of any changes in an application for a special permit be given to the appropriate Community Board so that it may consider same and offer its views on the proposal. In the case at bar, it is absolutely irrelevant that it was the School's consultants, and not the BSA, which provided the Community Board with the correcting document. The purpose of § 668 was satisfied when the Community Board received the additional submission.⁵ Indeed, Petitioners do not contend otherwise. Moreover, they offer no authority for the grant of the extreme relief requested based on such a hyper-technical alleged failure to meet a notice requirement. Since the face of the letter sent to the BSA by the School's consultants clearly indicated that the Community Board had been sent a copy of the amendment to the application, there was no logical or rational reason for the BSA to renotify the Community Board. These facts do not warrant the vacatur of the BSA's determination to grant the special permit.

B. The BSA Made The Appropriate Findings Under ZR § 73-03

Petitioners claim that the BSA failed to make the findings mandated by ZR § 73-03(a) which specifically requires that the BSA "shall make all of the findings required in the applicable sections in this Chapter". Thus, the BSA was, in accordance with § 73-03(a), required to make the specific findings as set forth in § 73-641. However, § 73-03(a), as it relates to this action, also contains its own specific requirements. First, the BSA was required to find essentially that any hazards or disadvantages to the community at large, resulting from such special permit, are outweighed by the advantages to that community. Accordingly, the BSA was required to make specific findings with respect to the benefits of the proposed modification to the community and any disadvantages to the community at large. The record contains such findings.

During the hearings the BSA heard testimony from the School's headmaster who described the educational mission of the School. He testified that, because of the School's location straddling the Upper East Side and East Harlem, it has attempted to educate boys from both neighborhoods. The headmaster testified that, of the other schools of its kind in New York City, only St. Bernard's and one other had no kindergarten, a necessary addition if the school is to survive. The School intends to add a kindergarten class of 40 students to its student body for which it estimated an additional 30 square feet of space per student would be required. Indeed, since the School had outgrown its existing space with the current 1st through 6th grade population of 330 students, the Headmaster testified that it would be necessary to expand the physical plant in any event. (R480-481). The proposal ultimately approved involves an expansion including new science rooms, a theater, a study room, additional classrooms and a gymnasium, all of which are to be multi-use and divisible into two or three sections (R482-483).

The BSA explored a report by the School's accrediting agency, the New York State Association of Independent Schools, which included recommendations that the School have additional science rooms, classrooms, nurses office, storage space and gymnasium. Significantly, the headmaster testified that this would be the last opportunity for the School to expand structurally because the proposed addition, with its requirements for re-enforcing the existing steel and adding new steel for the additional floors, will maximize the weight that the building can bear. (R488).

The BSA also heard testimony from one of the residents of petitioners' Co-op, not a party to this action, who had children attending the School. This resident testified, in support of the granting of the special permit, that the school was renowned and that an improved physical plant would not only enhance the neighborhood, but would also attract new families to the Co-op, particularly those with school-age children who might attend the school. Accordingly, this witness' testimony suggested that the proposed improvements would enhance the economic value and neighborhood appeal of the Co-op. This witness, indicating that she spoke for other Co-op residents, specifically denied that any harm would come to the Co-op from the proposed expansion.

The BSA also directly addressed the issue of any potential impact on neighborhood character. Although a letter, dated March 22, 1996, was submitted by Carnegie Hill Neighbors (R392), a neighborhood group, suggesting that there *might* be an adverse impact on the community, no one from that group attended the hearing. In fact, although the record was kept open for some 21 days subsequent to the second hearing, this group made no further submissions to the BSA. On the other hand, however, it is clear that the present facilities are used by the community for community functions. Indeed, the proposed new gymnasium would also be open to members of the community and available for additional and larger meetings than those currently able to be accommodated. (R468).

It is apparent from the record that the BSA found no hazards or disadvantages to the *community at large* from the proposed expansion. The BSA requested, and received drawings and information concerning any reduction in the lightwell of the Co-op from the proposed expansion. The School's architect testified that the expansion on the eastern side of the building would leave a thirty-foot rear yard and that the expansion of the rear of the building would not extend beyond the rear property line of the Co-op. (R493).

At the close of the hearings, the BSA Chair stated that he was "hard pressed after two hearings on this case to try to determine how this proposal for a special permit would have any significant impact or negative impact on the public welfare". (R470). He further stated, "I do acknowledge that there are a number of windows which will be bricked up here. The discretionary action that is before us, by my count, will result in three bricked up windows that are lot line windows in the adjacent building. Unquestionably, there will be some windows that face a court which will have views diminished. The vast majority of the windows will have views diminished; will be diminished by an as-of-right enlargement⁶ to the existing school". (R470). In sum, this Court finds that there is considerable evidence in the record to support the BSA's finding that the only disadvantage of this proposal was not to the community at large, but rather to some of the residents of one neighboring building -- the Co-op.

The second determination that the BSA was required to make pursuant to ZR § 73-03(a) was that any adverse effect on the neighborhood as to privacy, quiet, light and air, would be minimized by appropriate conditions governing the site or design. In this regard the BSA findings were comprehensive and went beyond the mere restatement of the words of the resolution. Thus, based on all the evidence submitted to it, the BSA found that if the School were to accomplish its desired expansion by building only "as-of-right" (*i.e.* in a manner not requiring a special permit), it would actually result in a taller structure than under the proposed plan. The BSA further found that such an increased height to the School would result in a reduction of light and air to the adjacent residential buildings on East 97th Street as well as to the Co-op. While the BSA recognized that the School's proposal would also reduce the light and air to *some* of the windows in the Co-op, it also concluded that such a reduction in light and air would affect the same number of (if not fewer) existing windows than would be the case with an "as-of-right" expansion. The record supports these findings.

The BSA also heard from a Mr. Lewis at the hearing.⁷ Mr. Lewis submitted photographs of those portions of his 10th floor apartment that would be adversely affected by the proposed expansion. These photographs, however, demonstrated only the effect of the expansion on those of his lot line windows which could be blocked as-of-right. Lot line windows have no legal protection under law, *D'Inzillo v. Basile*, 180 Misc. 237, 40 N.Y.S.2d 293, *aff'd*, 266 A.D. 875, 43 N.Y.S.2d 638 (2d Dept. 1943), regardless of whether the modification is constructed pursuant to a special permit or "as-of-right". Accordingly, these photographs were not relevant to the issue of light and air as it related to the application for a special permit.

Petitioners claim that the BSA Chairperson "noted for the record at the close of the second hearing" that the BSA had adopted the School's view "that the determination of this application is controlled by the Court of Appeals decision in *Cornell University v. Bagnardi*". (Pet. Memo of Law in Support of Petition, p. 18). This Court's review of the record indicates that, while the Chair made the statement quoted above, it does not indicate an adoption of an improper standard nor that the BSA failed to make the findings required by § 73-03(a).

In fact, the *Cornell University* decision (68 N.Y.2d 583, 510 N.Y.S.2d 861 (1986)) is relevant to the instant case. The Court of Appeals was deciding whether a local zoning board had applied the correct criteria in considering the expansion of two colleges into previously all residential communities. The Court stated, "[B]oth schools should be given the opportunity to apply for special permits without having to show a special need, and the municipalities in which they are located should be given the opportunity to determine whether reasonable conditions should be imposed that would mitigate *any deleterious effects on the surrounding community*". *Id.* at 597. (Emphasis added).

Clearly, deprivation of privacy, light and air is but one of the potentially deleterious effects building expansion may have on a surrounding community. Deprivation of privacy, light and air is also a paramount concern with respect to its impact on the public health and welfare and is, therefore, within the scope of the police power of zoning boards to regulate. *Wulfsohn v. Burden*, 241 N.Y. 288 (1925); *Vangellow v. City of Rochester*, 190 Misc. 128, 71 N.Y.S.2d 672 (Monroe Cty. 1947) ("There is, to be sure, a distinction between establishing setback lines to promote the public health or welfare by making space for light and air" (quoting *Wulfsohn v. Burden*, *supra*)).

The record amply demonstrates that the BSA *did* consider the effect of the proposed expansion on light and air of the adjacent building. Moreover, with respect to the immediate community (*i.e.* adjacent buildings, including petitioners' Co-op building), the BSA found no deleterious impacts on the community at large, save for a potential increase in noise. Accordingly, and as provided by ZR § 73-03(a), the BSA set forth specific conditions regarding HVAC equipment to minimize any noise resulting from the proposed modification. In reviewing the full record, this Court finds that the BSA made the findings required by ZR § 73-03(a). This Court further finds that the BSA's determination is supported by substantial evidence in the record.

C. The BSA Made The Appropriate Finding Under ZR § 73-641(b) and (c)

Petitioner claims that the BSA failed to make appropriate findings under ZR § 73-641(b) and (c). As indicated *infra*, neither of these claims has merit. In each case the BSA made the required findings and those findings were supported by substantial evidence in the record before it.

Under § 73-641(b), the BSA is required to find, as one of the conditions for granting a special permit, that "without such modification, there is no way to design and construct the new buildings or enlargements in satisfactory physical relationships to the existing buildings which are to remain upon the site, so as to produce an integrated development".

Zoning boards are required to make findings of fact where the rules and standards for its guidance are stated in the ordinance. *Newmark & Lewis Levittown Corp. v. Board of Zoning Appeals of the Town of Hempstead*, 194 N.Y.S.2d 126 (Nassau Cty. 1959). These findings are insufficient if they are merely conclusory and/or “couched in the language of the ordinance”. *Ouderkirk v. Board of Appeals of the Town of Bethlehem*, 58 A.D.2d 667, 395 N.Y.S.2d 527, 529 (3rd Dept. 1977); *Zebrowski v. Herdman*, 72 Misc.2d 973, 339 N.Y.S.2d 989 (Rockland Cty. 1972).

The central issue as to ZR § 73-641(b) is whether the BSA made sufficient findings with respect to the existence of an integrated development between the existing structure and any modification thereto or whether the BSA merely restated the language of the ordinance without making sufficient findings to support its determination. The BSA's findings were sufficient in this regard as is apparent from the face of its April 23, 1996 resolution. (R1-2). *Newmark & Lewis Levittown Corp. v. Board of Zoning Appeals of the Town of Hempstead*, *supra*, 194 N.Y.S.2d 126 (Nassau Cty. 1959).

The resolution itself demonstrates that the BSA did not merely quote the language of the ordinance, but made further extensive and specific findings. Thus, the language of the resolution did state that the modification was necessary in order to produce an enlargement that would create an integrated development with the existing structure. However, the resolution supported that finding by evidence in the record before it. Thus, the BSA found that an as-of-right expansion (one requiring no special permit) would not create an integrated development. Rather, the BSA found that such an enlargement would create functional inefficiencies as well as prevent the School from attaining the floor space necessary for its programmatic needs because of the mandate that it add an elevator for disabled access. In addition, the BSA took pains to note that alternative plans submitted would not be of sufficient size and configuration to meet the School's programmatic needs and would preclude an integrated development within the site.

The above-described findings have substantial support in the record of the hearings before the BSA. Indeed, during the hearing, the Co-op's attorney and Vice-Chair Robert E. Flahive discussed the fact that the only way to construct the upper expansion to result in an integrated development within the site was to modify the height and setback requirements. Thus, the BSA made the findings required by ZR § 73-641(b).

Petitioner also claims that the BSA failed to make appropriate findings under ZR § 73-641(c). Pursuant to that subsection, the BSA is also required to find, as a condition to granting a special permit, “that such modification is the minimum modification necessary to permit the development of such integrated community facility, and thereby creates the least detriment to the character of the neighborhood and the use of nearby zoning lots”. It did so.

Once again the specific language of the BSA resolution itself demonstrates that the BSA not only quoted the language of the ordinance, but also made specific findings. *Newmark & Lewis Levittown Corp. v. Board of Zoning Appeals of the Town of Hempstead*, *supra*, 194 N.Y.S.2d 126 (Nassau Cty. 1959). The BSA clearly and specifically found that, were the School to have modified the building on an as-of-right basis, such modification would have created more of a detriment to the neighborhood's character and would have had a greater effect on adjacent properties than would the instant proposal. Additionally, the BSA examined alternative plans and specifically found that they, too, would have a more significant and negative impact on adjacent buildings. Finally, the BSA made specific findings that the alternative plans submitted would prevent the School from creating an integrated facility. Accordingly, the BSA did not fail to make the required findings pursuant to ZR § 73-641(c).

D. Petitioners' Other Contentions Are Without Merit

Finally, Petitioners claim that the BSA acted arbitrarily and capriciously by failing, a) to require the School to first increase the height and area of its structure as a matter of right as a pre-condition to granting a special permit and b) to consider the negative impact upon the community at large should the special permit be granted. Neither of these suggested considerations

are requirements of ZR § 73-641(b) or (c). Accordingly, assuming for the moment that the BSA did not require such a pre-condition to be satisfied or make the suggested finding, it did not act arbitrarily and capriciously. However, petitioners are in error as to the facts. In this case, the BSA *did* consider the petitioners' proposal that the issuance of any special permit be conditioned on an initial as-of-right modification. Having considered the issue, the BSA *did* determine that an as-of-right enlargement would have a greater negative impact upon the surrounding neighborhood than would the proposed modification. Moreover, and although not required to do so by Z. R. § 73-641(b) or (c), the BSA made additional findings with respect to the effects on the surrounding community pursuant to Z. R. 73-03 (a), as reflected in the record and as discussed in Part B above. Therefore, petitioners' contentions are wholly without support in the record.

Lastly, petitioners claim that the BSA failed to look behind the School's justifications for the modification. Specifically, petitioners claim that that portion of the proposed modification creating a new gym is a "luxury, not a necessity". There is no requirement under the applicable ordinances that the BSA look behind the proffered reasons for an application for a special permit or that the proposed modifications be an absolute necessity as a pre-condition to granting a special permit. Indeed, the *Cornell* decision, *supra*, clearly suggests otherwise. While, as discussed above, ZR § 73-641(b) and (c) require that the proposed enlargement be necessary and the only way to modify a structure to produce "an integrated development" or an "integrated community facility", nowhere is there a requirement that the BSA investigate the reasons given for an application to ascertain some undefined level of necessity. Opposition by residents of the neighborhood is not an appropriate basis for a denial of a special permit. *New York Tennis Associates v. Vestal*, 97 A.D.2d 899, 470 N.Y.S.2d 466 (3rd Dept. 1983); *C.B.H. Properties v. Rose*, 205 A.D.2d 686, 613 N.Y.S.2d 913, *app. den.*, 84 N.Y.2d 808, 621 N.Y.S.2d 517 (2nd Dept. 1994). Indeed, where compliance with conditions imposed by an ordinance is shown, the issuance of a special permit becomes a ministerial, not a discretionary, act. *Peter Pan Games of Bayside, Ltd. v. Board of Estimate of the City of New York*, *supra*, 67 A.D.2d 925, 926, 413 N.Y.S.2d 164, 166 (2nd Dept. 1979); *Knight v. Bodkin*, *supra*, 41 A.D.2d 413, 344 N.Y.S.2d 170; *Roginski v. Rose*, *supra*, 63 N.Y.2d 735, 480 N.Y.S.2d 206 (1984); *Valley Home Construction, Ltd. v. Van Wagner*, *supra*, 53 A.D.2d 863, 385 N.Y.S.2d 353, *aff'd*, 41 N.Y.2d 1028, 395 N.Y.S.2d 631 (1977). The School complied with all conditions imposed upon it by the Zoning Regulations. Accordingly, the BSA was required to issue the special permit.

E. Petitioners' Motion To Amend The Petition

Since this Court is denying the requested relief of an annulment of the determination of the BSA to grant a special permit to the School, the issue of petitioners' motion to amend the petition would seem to be a moot issue. However, even if the Court were to address the merits of this additional application by Petitioners, the motion would still be denied.

Nearly six months after issue was joined and nearly one year following the BSA's determination granting the Special Permit, petitioner sought to amend the petition. Petitioners claim that leave to amend should be granted because, 1) the School misled the BSA regarding placement of HVAC equipment on the roof and the use of the roof as a play deck and 2) the BSA failed to comply with findings required by ZR § 73-03.

With respect to the first basis for the amendment, petitioners do not allege that the BSA acted arbitrarily and capriciously. The basis for petitioners' assertion appears to be an allegation only that the School acted inappropriately or in violation of the Special Permit. Petitioners' dispute is not, in this regard, with the BSA, but with the School. As such, petitioners' claims are not properly brought in an Article 78 proceeding.

With respect to petitioners' second basis for seeking leave to amend, petitioners admit that this objection has been previously made by them and has been "reiterated and responded to in subsequent memoranda of the parties". An opportunity to amend the petition at this late juncture would therefore be unnecessary, given petitioners' admission that the issue is *sub judice*. Moreover, to grant this relief would be prejudicial to respondent-intervenor, which received its Special Permit nearly one year ago, but has

been prevented, by this litigation from going forward. Further delay, as a result of the inevitable filing of new answers, replies and memoranda of law by the parties on an issue that the Court has before it, would only further prejudice the respondent-intervenor.

For all of the forgoing reasons, it is

ORDERED AND ADJUDGED that petitioner's motion for leave to amend the petition is denied in its entirety and it is further

ORDERED AND ADJUDGED that respondents' cross-motion to dismiss the petition is granted in its entirety, and it is further

ORDERED AND ADJUDGED that the petition is denied in its entirety and the petition is dismissed.

The foregoing constitutes the decision and order of this Court.

DATED: June 30, 1997

ENTER,

<<signature>>

PATRICIA ANNE WILLIAMS

ACTING JUSTICE OF THE SUPREME COURT

Footnotes

- 1 The exact number of lot line windows affected appears to be either 13 or 15. The discrepancy is not resolved by the parties or by the BSA in the record.
- 2 The petitioners do not contend that the use of the building located at 4 East 98th Street, as a school, is one not contemplated by the applicable ordinances.
- 3 The record indicates that the letter should have been dated March 13, 1996.
- 4 Thereafter, at the request of the BSA, the City of New York Landmarks Preservation Commission was contacted. That Commission apparently reviewed the submission and concluded, in a letter to the BSA dated March 22, 1996, that there were "no adverse impacts anticipated". With that comment, the Commission concluded its study of the proposed modification.
- 5 Indeed, it is not unreasonable to assume that the Community Board received the additional documentation sooner by receiving it directly from the School's consultants, rather than from the BSA *after* the latter had received it.
- 6 To construct "as-of-right" essentially means that height and setback requirements are not to be exceeded or where the building's use will not be altered. *In the Matter of Neville*, 79 N.Y.2d 416, 422, 583 N.Y.S.2d 802, 804 (1992).
- 7 While the transcript does not reflect Mr. Lewis' first name, it appears that he is probably the Mr. Wright B. Lewis who is one of the petitioners in this proceeding.

251 A.D.2d 261

Supreme Court, Appellate Division,
First Department, New York.

In re Application of TWO EAST NINETY EIGHTH
STREET, INC., etc., et al., Petitioners–Appellants,
For a Judgment, etc.,

v.

BOARD OF STANDARDS AND APPEALS
OF THE CITY OF NEW YORK, etc.,
et al., Respondents–Respondents.

June 30, 1998.

Attorneys and Law Firms

Fabian G. Palomino, for petitioners-appellants.

Julian L. Kalkstein and Jerome Tarnoff, for respondents-respondents.

Opinion

*261 Order, Supreme Court, New York County (Patricia Williams, J.), entered on or about May 13, 1997, unanimously affirmed for the reasons stated by Williams, J., without costs or disbursements.

MILONAS, J.P., and WALLACH, RUBIN and MAZZARELLI, JJ., concur.

Parallel Citations

251 A.D.2d 261, 675 N.Y.S.2d 528 (Mem), 1998 N.Y. Slip Op. 06535

MINUTES

WHEREAS, Z.R. §15-53 requires a building owner to pay the full conversion contribution prior to the issuance of an alteration permit required to convert former commercial or manufacturing space unless the owner is entitled to any applicable discount or exclusion from such payment permitted under the Relocation Incentive Program; and

WHEREAS, under Z.R. §72-30, the Board of Standards and Appeals ("Board") is empowered to make administrative determinations and issue authorizations in accordance with the Relocation Incentive Program under Z.R. §15-50 regarding the amount of conversion contribution to be paid or any applicable discount or exclusion from such payment; and

WHEREAS, Z.R. §15-554 provides that upon proof that floor area sought to be converted in an applicable building has been vacant for a minimum of five years immediately preceding the date of the application, the Board shall issue an authorization that no conversion contribution is required to be made for such floor area; and

WHEREAS, the Board has determined that sufficient proof has been submitted to sustain this vacancy findings under Z.R. §15-554 for the exclusion from payment of the conversion contribution for certain floor area;

Resolved that the Board hereby makes the findings required to be made under Z.R. §15-554 and authorizes the exclusion from payment of the conversion contribution for

4,333 SQ FT OF FLOOR AREA ON THE 2ND FLOOR
for a total of 4,333 square feet of floor area excluded pursuant to Z.R. §15-554 on condition that this administrative determination and authorization is limited to the objection above cited; and that all applicable laws, rules and regulations be complied with.

ENDORSEMENT - In those instances as detailed above, where the Board has authorized the **EXCLUSION** of floor area from the computation of the conversion contribution, pursuant to Z.R. §15-554 the owner has fulfilled all the requirements of §15-50 *et. seq.* for the conversion of such floor area, and no further action by the Board is required.

Adopted by the Board of Standards and Appeals, April 23, 1996.

150-95-BZ **4-23-96**

APPLICANT - Paul D. Seiver, Esquire, for St. Bernard's School, Incorporated, owner.

SUBJECT - Application October 24, 1995 - under Z.R. §73-641, to permit the proposed enlargement of an existing school building (Use Group 3), located in an R7-2 and R-9(PI) district, by expansion of the fifth floor and construction of a sixth and seventh floor which exceeds the permissible height within the initial setback distance and requires a special permit as per Z.R. §24-522.

PREMISES AFFECTED - 4/10 East 98th Street, south side, 125' east of Fifth Avenue, Block 1603, Lot 63, Borough of Manhattan.

COMMUNITY BOARD #10 M

APPEARANCES -

For Applicant: Paul Seiver.

For Administration: John Scrofani, Fire Department.

THE VOTE TO GRANT -

Affirmative: Chairman Silva, Vice-Chair Flahive, Commissioner Palladino and Commissioner Chin.....4

Negative.....0

Absent: Commissioner Joseph.....1

THE RESOLUTION -

WHEREAS, the decision of the Borough Commissioner, dated October 2, 1995, acting on N.B. Applic. #101078735, reads:

"Proposed enlargement of a school building partially in an R7-2 district and partially in an R9 (PI) District exceeds the

permissible height within the initial setback distance contrary to Section 24-522 of the Zoning Resolution"; and

WHEREAS, Community Board No. #11, Manhattan, has recommended approval of this application; and

WHEREAS, a public hearing was held on this application on February 27, 1996 after due notice by publication in the Bulletin, laid over to March 26, 1996 and then to April 23, 1996 for decision; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by a committee of the Board consisting of Chairman Gaston Silva, R.A., Vice-Chair Robert E. Flahive, P.E., Commissioner James Chin and Commissioner Rosemary F. Palladino, J.D.; and

WHEREAS, this is an application filed under Z.R. §73-461 to permit the proposed enlargement of an existing school building (Use Group 3) located in an R7-2 and R-9 (PI) district, by expansion of the fifth floor and construction of a sixth and seventh floor, which exceeds the permissible height within the initial setback distance and requires a special permit pursuant to Z.R. §24-522; and

WHEREAS, the subject lot is a large lot fronting on E. 98th Street located primarily in an R7-2 district with a small portion located in an R9 district and is developed with a five-story not-for-profit school;

WHEREAS, the school was originally constructed in 1915 as a four story building with a fifth story later added to a portion of the building that encroached into the sky exposure plane pursuant to a special permit granted by the Board under Cal. No. 970-87-BZ;

WHEREAS, it is now proposed to expand the fifth floor onto the roof of the existing four story west wing and add a sixth and seventh floor to the building that would exceed the maximum 85' height of the front wall of the building in the R9 zoning district and the maximum 60' height of the front wall of the building in the R7 district within the 20' required setback; and

WHEREAS, specifically, the school intends to reconfigure several existing floors and add approximately 21,732 square feet of new space to the building to house a new science facility in the new west wing of the fifth floor, add new classrooms, seminar rooms and a teaching theater on the sixth floor, construct a new gymnasium with a basketball court and locker rooms on the seventh floor and install a new elevator and penthouse for mechanical equipment; and

WHEREAS, the school has adequately demonstrated that the modification of the height and setback regulations sought is required in order to enable the school to continue to provide its essential educational service to the community; and

WHEREAS, for example, as reasons for the proposed enlargement the school has pointed to its increased enrollment, changing technological needs, inadequate facilities and its need to add a kindergarten and augment its academic programs and facilities to attract students and continue to provide a high quality elementary school education; and

WHEREAS, the school has submitted a summary of a recommendation from the New York State Association of Independent Schools ("NYSAIS") after an evaluation of the school conducted in 1995 that suggested the school should consider adding an additional gymnasium and locker room facility, as well as expanded facilities for science and drama, among other improvements; and

WHEREAS, the proposed enlargement will allow the school to add two kindergarten classes, provide a separate outdoor play area for these children, upgrade its science and music facilities, provide a teaching theater, locate all classes for each grade on a single level and organize the classes for each of the school's three divisions on contiguous floors; and

MINUTES

WHEREAS, the proposed enlargement will also allow the school to expand its physical education facilities to provide additional gymnasium space with an adequately sized playing area with safety margins around the perimeter and sideline seating for participants and spectators, allowing better coordination of its recess and physical education classes; and

WHEREAS, the school has demonstrated that without this proposed modification, there is no way to design and construct the new enlargement in a satisfactory physical relationship to the existing building on the site so as to produce an integrated development; and

WHEREAS, for example, the school contends that the split zoning on the lot and applicable bulk regulations related thereto would limit the size of a floor plate in an as-of-right building, create functional inefficiencies in dispersing students and faculty over a larger number of floors and eliminate floor area necessary to meet the school's programmatic needs because of the required installation of an elevator; and

WHEREAS, the school has also demonstrated that an alternative plan analyzed by the school would require a variance of applicable zoning regulations, as well as a modification of height and setback regulations by special permit, and would create an enlarged building that would be closer to the rear wall of the buildings on the north side of E. 97th Street and also affect courtyard windows facing east on the adjacent building located at 1165 Fifth Avenue; and

WHEREAS, the school has further demonstrated that the proposed modification is the minimum necessary to permit the development of an integrated school facility and thereby create the least detriment to the character of the neighborhood and the use of nearby zoning lots; and

WHEREAS, for example, an as-of-right enlargement of the building would actually make it taller and reduce light and air to the adjacent residential buildings located on the north side of East 97th Street; and

WHEREAS, by contrast, this proposal will have a proposed street wall significantly reduced in height from what would otherwise be permitted as-of-right and will rise to a height which is more consistent with the height of many neighboring midblock street walls and the surrounding neighborhood character; and

WHEREAS, the school's proposal will still be significantly less than the maximum floor area ratio and fully comply with the lot coverage permitted in these residential districts; and

WHEREAS, the Board has carefully analyzed an alternative plan submitted by residents of neighboring buildings appearing in opposition to this proposal ("the opposition") and finds that this proposal would not permit the school to have a integrated facility of a sufficient size and configuration to meet the school's programmatic needs; and

WHEREAS, specifically, the alternative plan submitted by the opposition for a smaller enlargement would not provide contiguous classroom space and adequately sized facilities needed to accommodate the school's programmatic needs and would disrupt the school's operations during construction and require expensive demolition and construction of a new structure with additional load bearing capacity; and

WHEREAS, although the Board acknowledges that the light and air of some windows in adjacent buildings will be affected by the applicant's proposal, it notes that those windows affected are lot line windows which are not legally protected under the New York City Administrative Code and that, at most, there will be three additional lot line windows affected by this proposal that are in the setback that would be required with an as-of-right enlargement; and

WHEREAS, finally, the school has hired an acoustical consultant to analyze any potential noise impacts from rooftop air

conditioning equipment proposed and has screened and relocate this equipment to maximize compliance with the New York City Noise Control Code; and

WHEREAS, the totality of the evidence presented thus demonstrates that the proposed enlargement is the only practical and feasible design to produce an integrated community facility which will meet this school's educational needs with the least impact on the adjacent lots and surrounding neighborhood; and

WHEREAS, the Board has determined that the evidence in the record supports the findings to be made under Z.R. §73-641; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has taken a "hard look" at all relevant areas of environmental concern;

WHEREAS, the evidence demonstrates no foreseeable significant environmental impacts that would require the preparation of an Environmental Impact Statement; and

WHEREAS, therefore, the Board has determined that the proposed action will not result in any significant environmental effects;

Therefore, it is Resolved that the Board of Standards and Appeals issues a Type I Negative Declaration under 6 N.Y.C.R.R. Part 617 and §6-07(b) of the Rules of Procedure for City Environmental Quality Review and makes the required findings and grants a special permit under Z.R. §73-641 to permit, the proposed enlargement of an existing school building (Use Group 3) located in an R7-2 and R-9 (PI) district, by expansion of the fifth floor and construction of a sixth and seventh floor, which exceeds the permissible height within the initial setback distance and requires a special permit pursuant to Z.R. §24-522; on condition that all work shall substantially conform to drawings as they apply to the objection above noted, filed with this application marked "Received December 12, 1995"-(1) sheet and "March 1, 1996"-(32) sheets; and on further condition;

THAT HVAC equipment shall be screened and located in accordance with BSA approved plans and shall comply with all applicable rules and regulations, including the New York City Noise Control Code;

THAT the above conditions shall appear on the certificate of occupancy;

THAT the development, as approved, is subject to verification by the Department of Buildings for compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under the jurisdiction of the Department; and

THAT substantial construction shall be completed in accordance with Z.R. §73-70.

Adopted by the Board of Standards and Appeals, April 23, 1996

92-92-BZ

APPLICANT - Philip P. Agusta, R.A., M.U.P., for 860 Owners Corporations; Solomon Lesch, Esquire, Gallin and Newman Attorneys, lessees.

SUBJECT - Application May 19, 1992 - under Z.R. §72-21, to permit the proposed lawyers' offices in a multiple dwelling containing apartments and medical offices, in an R8 and C zoning district which is contrary to Z.R. §122-02 and §22-10.

PREMISES AFFECTED - 860 Grand Concourse, northeast corner of East 159th Street, Block 2459, Lot 30, Borough of The Bronx. COMMUNITY BOARD #4 BX

APPEARANCES - None.

ACTION OF THE BOARD - Laid over to June 4, 1996, at 2 P.M., for continued hearing.

MINUTES

THAT the above conditions shall appear on the Certificate of Occupancy;

THAT a new Certificate of Occupancy shall be obtained within one year from the date of this amended resolution;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s) only;

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

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under its jurisdiction irrespective of plan(s) and/or configuration(s) not related to the relief granted." DOB. No. 103086839)

Adopted by the Board of Standards and Appeals, July 9, 2002.

150-95-BZ 7-9-02

APPLICANT - Paul Selver, Esq., for St. Bernard's School, Inc., owner.

SUBJECT - Application November 19, 2001 - reopening for an amendment to the resolution.

PREMISES AFFECTED - 4-10 East 98th Street, aka south side of 98th Street, 125' east, Block 1603, Lot 63, Borough of Manhattan.

COMMUNITY BOARD #11M

APPEARANCES -

For Applicant: Paul Selver.

For Administration: Capt. Michael Maloney and John Scrofani, Fire Department.

ACTION OF THE BOARD - Application withdrawn.

THE VOTE TO WITHDRAW -

Affirmative: Chairman Chin, Vice-Chair Babbar, Commissioner Korbey, Commissioner Caliendo and Commissioner Miele.....5
Negative:0

Adopted by the Board of Standards and Appeals, July 9, 2002.

1069-27-BZ, Vol. III

APPLICANT - Sheldon Lobel, P.C., for Frank Mormando, owner.

SUBJECT - Application July 12, 2001 - request for a waiver of the Rules of Practice and Procedure, reopening for an extension of term of variance which expired March 6, 2001 and for an amendment to the resolution.

PREMISES AFFECTED - 6702/6724 New Utrecht Avenue, irregular-shaped triangular block bounded by New Utrecht Avenue, 15th Avenue and 68th Street, Block 5565, Lot 1, Borough of Brooklyn.

COMMUNITY BOARD #11BK

For Applicant: Lyra Altman and Frank Mormando.

THE VOTE TO CLOSE HEARING -

Affirmative: Chairman Chin, Vice-Chair Babbar, Commissioner Korbey, Commissioner Caliendo and Commissioner Miele.....5
Negative:0

ACTION OF THE BOARD - Laid over to August 6, 2002, at 10 A.M., for decision, hearing closed.

74-49-BZ

APPLICANT - Sheldon Lobel, P.C., for 515 Seventh Associates, L.P., owner.

SUBJECT - Application November 8, 2001 - request for a waiver of the Rules of Practice and Procedure and reopening for an extension of time to complete construction and to obtain a certificate of occupancy which expired April 4, 2001.

PREMISES AFFECTED - 515 7th Avenue and 144-158 West 38th Street, Block 813, Lot 64, Borough of Manhattan.

COMMUNITY BOARD #5M

APPEARANCES -

For Applicant: Lyra Altman.

ACTION OF THE BOARD - Laid over to August 6, 2002, at 10 A.M., for continued hearing.

674-52-BZ

APPLICANT - Carl A. Sulfaro, Esq., for Steven Ibrahim, owner.

SUBJECT - Application August 18, 2001 - request for a waiver of the Rules of Practice and Procedure and reopening for an extension of term of variance which expired December 13, 2000.

PREMISES AFFECTED - 21-04 21st Avenue, southeast corner of 21st Street, Block 880, Lot 46, Borough of Queens.

COMMUNITY BOARD #1Q

APPEARANCES -

For Applicant: Carl A. Sulfaro.

THE VOTE TO CLOSE HEARING -

Affirmative: Chairman Chin, Vice-Chair Babbar, Commissioner Korbey, Commissioner Caliendo and Commissioner Miele.....5
Negative:0

ACTION OF THE BOARD - Laid over to August 6, 2002, at 10 A.M., for decision, hearing closed.

TWO EAST 98TH STREET V. BSA

Respondent NYC Memo of Law

[Printed in WORD format from old Wordperfect document -- contains formatting errors/no memo of law cover page, etc.]

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| PRELIMINARY STATEMENT | 3 |
| STATEMENT OF MATERIAL FACTS | 4 |
| <u>THE PROJECT</u> | 4 |
| BSA REVIEW OF THE APPLICATION | 6 |
| BSA RESOLUTION | 9 |
| BSA RESOLUTION | 9 |
| RELEVANT STATUTORY PROVISIONS | 16 |
| ARGUMENT | 22 |
| POINT I | 22 |
| <u>A. THE STANDARD FOR JUDICIAL REVIEW IS WHETHER OR NOT THE BSA'S DETERMINATION HAD A RATIONAL BASIS</u> | 22 |
| <u>B. UPON THE DETERMINATION THAT THE APPLICATION SATISFIED THE CONDITIONS FOR THE GRANT OF A SPECIAL PERMIT PURSUANT TO THE ZONING RESOLUTION, RESPONDENTS PROPERLY GRANTED THE SPECIAL PERMIT</u> | 24 |
| POINT II | 28 |
| <u>A. THE BSA PROPERLY MADE THE FINDING PURSUANT TO ZR § 73-641(A)- THAT SUCH MODIFICATION IS REQUIRED IN ORDER TO ENABLE SUCH USE TO PROVIDE AN ESSENTIAL SERVICE TO THE COMMUNITY.</u> | 28 |
| <u>B. THE BSA PROPERLY MADE THE FINDING PURSUANT TO ZR § 73-641(B)-THAT WITHOUT SUCH MODIFICATION THERE IS NO WAY TO DESIGN AND CONSTRUCT THE NEW BUILDINGS OR ENLARGEMENTS IN SATISFACTORY PHYSICAL RELATIONSHIPS TO THE EXISTING BUILDINGS WHICH ARE TO REMAIN UPON THE SITE, SO AS TO PRODUCE AN INTEGRATED DEVELOPMENT.</u> | 29 |
| <u>C. THE BSA PROPERLY MADE THE FINDING PURSUANT TO ZR § 7-641(C)-THE MODIFICATION GRANTED WAS THE MINIMUM NECESSARY</u> | 31 |
| <u>D. THE BSA PROPERLY MADE THE FINDINGS REQUIRED BY ZONING RESOLUTION § 73-01 ET SEQ. INCLUSIVE OF § 73-03 (A)</u> | 35 |

| | |
|---|----|
| POINT III | 41 |
| CONCLUSION | 46 |
| <u>THE PROJECT</u> | 13 |
| BSA REVIEW OF THE APPLICATION | 16 |
| <u>BSA RESOLUTION</u> | 21 |
| JURISDICTION | 28 |
| <u>VARIANCE AND SPECIAL PERMITS</u> | 28 |
| 72-00 POWERS OF THE BOARD OF STANDARDS AND APPEALS | 29 |
| 72-01 GENERAL PROVISIONS | 29 |
| 73-641 (12/15/61) | 30 |
| POINT II | 55 |
| <u>CONCLUSION</u> | 58 |

PRELIMINARY STATEMENT

By Notice of Petition and Petition dated May 24, 1996, Petitioners commenced the instant proceeding seeking a judgment pursuant to Article 78 of the Civil Practice Law and Rules setting aside as arbitrary and capricious the BSA's determination which approved a special permit for the expansion of a school in a manner which would exceed the permissible height within the initial setback distance as set forth in the Zoning Resolution.

This memo of law is being submitted by respondents the Board of Standards and Appeals of the City of New York (hereafter "BSA"), Gaston Silva, R.A., Robert E. Flahive, P.E., Rosemary F. Palladino and Cecil P. Joseph, and James Chin, in opposition to the Petition which should be dismissed.

STATEMENT OF MATERIAL FACTS

The Project

On October 24, 1995 the St. Bernard's School applied to the BSA for a special permit pursuant to the Zoning Resolution (hereinafter the "ZR") § 73-641 (R4).¹

The lot for which the special permit is sought is Block 1603, Lot 63, 4 (a/k/a 4/10) East 98th Street, Borough of Manhattan (hereinafter the "premises"), which is zoned R7-2 and R-9² (R4). The premises is owned by the St. Bernard's School, Inc., a not-for-profit New York educational institution (hereinafter the "School") founded in 1904. The School has been continuously occupied the Building at the subject premises since 1915 (R4).

The property consists of a large lot fronting on East 98th Street developed with a five story school building (R4). The lot is 125 feet from west to east on the south side of East 98th Street, and 100 feet, 11 inches deep, with an area of 12,615 square feet (R4). The building is 125 feet wide and 61 feet, 6 inches deep, with a total floor area of 36,574 square feet (R4). The premises is bounded on the west by a fifteen story, approximately 155 feet tall building in the R9 district. The premises are bounded on the east by a nine story, approximately 95 feet tall building in the R7-2 district. Both of these neighboring building have front walls which do not conform with the respective setback requirements which currently govern the two zoning districts. On the north side of East 98th Street, a fourteen story building owned by Mt. Sinai Hospital faces the Building. To the south of the zoning lot, there are several six story tall residential buildings which front on the north side of East 97th Street. These buildings extend deeply into their lots, coming within approximately 12 to 13 feet of the zoning lot. (R4).

The proposed project consists of the expansion of the existing fifth floor onto the roof of the existing four story west wing and adding a sixth and seventh floor to the building. Specifically, the School intends to reconfigure several existing floors and add approximately 21,732 square feet of new space to the building to house a new science facility in the new west wing of the fifth floor, add new classrooms, seminar rooms and a teaching theater on the sixth floor, construct a new gymnasium with a basketball court and locker rooms on the seventh floor and install a new elevator and penthouse for mechanical equipment (hereinafter the "Project").

In response to plans filed at the New York City Department of Buildings (hereinafter "DOB") by the School, DOB issued an objection to the plans on October 2, 1995

¹ Citations to the Record consisting of Volumes I, II and III, pages 1-517 are referred to by an R followed by the appropriate page number.

² The Zoning Resolution divides the City into three use districts: Residential-R; Commercial-C; and Manufacturing-M. Within each district the size or bulk of a building is also regulated. This is indicated by a number after the letter. The higher the number the greater the bulk allowed.

(R3).³ To cure the objection, the School applied to the BSA for a special permit under ZR§ 73-641 (R4).

In R9 zoning districts, Section 24-522 of the Zoning Resolution limits the height of the front wall of a building to the lesser of 85 feet or nine stories above curb level. In R7 zoning districts, Section 24-522 limits the height of front walls to the lesser of 60 feet or six stories above curb level. Above the specified maximum height in R9 and R7 zoning districts, Section 24-50 requires a building on a narrow street (such as East 98th Street)⁴ to be set back 20 feet from the front lot line and not to penetrate a sky exposure plane of 2.7 to 1 unless it is a tower. (See approved plans at R280-311 for drawings which include as-of-right conditions.) The project's proposed fifth floor would have a maximum height of 72 feet above curb level; the proposed sixth floor would have a maximum height of 86 feet above curb level; and the proposed seventh floor would have a maximum height of 114 feet above curb level. The ZR requires the 100 feet long portion of the fifth and sixth floors located in the R7-2 zoning district and exceeding 60 feet in height to be set back 20 feet and the 25 foot long portion of the sixth floor located in the R9 district and exceeding 85 feet in height to be set back 20 feet. The western twenty-five feet of the fifth floor need not be set back. The ZR also requires the entire 125 foot length of the seventh floor to be set back 20 feet (R4). As a result, the proposed construction at the fifth, sixth and seventh floors would violate the applicable height and setback regulations of the ZR.

The School sought the special permit to allow the School to construct larger floors in order to house a new science facility in the new west wing of the fifth floor, add new classrooms, seminar rooms and a teaching theater on the sixth floor, construct a new gymnasium with a basketball court and locker rooms on the seventh floor and install a new elevator and penthouse for mechanical equipment thereby adding the approximately 21,732 square feet of new space to the building necessary to meet the School's programmatic needs (R4).

³ The Objection stated that the proposed enlargement of a school building partially in an R7-2 district and partially in an R9 (PI) District exceeds the permissible height within the initial setback distance contrary to Section 24-522 of the Zoning Resolution.

⁴ Section 12-10 states "[a] 'narrow street' is any *street* less than 75 feet wide."

BSA Review of the Application

In support of its application the School filed numerous submissions including floor plans and photos and proposed facts and findings.⁵ The School also submitted a summary of recommendations from the New York State Association of Independent Schools which had evaluated the school in 1995. The report suggested numerous improvements to the school, including; the addition of an additional gymnasium and locker room facility, expanded facilities for science and drama, additional space for the proposed new kindergarten, additional space for the infirmary, additional space for offices, additional storage space for records and supplies, and other improvements (R227-243).

Notice of the pending BSA hearing was duly served to affected property owners (R184-225). Consents were received from neighbors (R440-446).

Pursuant to City Charter § 668, the application was reviewed by Community Board No.11, Manhattan⁶. On December 4, 1995, the School made a presentation to the Community Board 11 zoning committee, which endorsed the proposal unanimously. In February, 1996, Community Board 11 voted unanimously to endorse the project (R473-474).

The Project was supported by Stribling & Associates, real estate brokers (R427); Seventeen East 97th Corp. (R440); Mt. Sinai Medical Center (R44); and several neighboring residents at 1170 Fifth Avenue (R416), 1165 Fifth Avenue (R417-422), and 1158 Fifth Avenue (R444-446),

The Project was opposed by the Board of Directors of 1165 Fifth Avenue (a/k/a 2 East 98th Street) (R244, 328, 352, 394, 396-404, and 437); the president of the Board of Directors of 1170 Fifth Avenue Corporation (R386); and a resident of 1165 Fifth Avenue, Mr. Lewis (R405).

The subject premises and surrounding area had a site and neighborhood examination by a committee of the Board consisting of Chairman Gaston Silva, R.A., Vice Chair

⁵ See submissions of October 24, 1995, (R4), including photos (R75-81) and plans (R32-74); December 1, 1995 (R 122); December 7, 1995 (R124); December 12, 1995 (R162); December 13, 1995 (R175); December 14, 1995 (R176); January 3, 1996 (R177); February 2, 1996 (R179); February 20, 1996 (R184); February 27, 1996 (R227); March 1, 1996 (R243), including plans (R279-311); March 5, 1996 (R312); March 15, 1996 (R320); March 21, 1996 (R354); March 22, 1996 (R387); March 28, 1996 (R411); April 11, 1996 (R424) and April 16, 1996 (R428).

⁶ City Charter § 668 provides that the appropriate Community Board shall review applications for special permits pursuant to the following procedure: a copy of the special permit application is forwarded to the Community Board, which must review the application within sixty days and either conduct a public hearing and prepare a written recommendation to the BSA, or waive the conduct of a public hearing and the preparation of a written recommendation. The receipt of such recommendation or waiver by the BSA constitutes authorization for the BSA to review the application.

Robert E. Flahive, P.E., Commissioner James Chin, and Commissioner Rosemary F. Palladino, J.D. (R1).

A Public Hearing took place at the BSA on February 27, 1996 (R472), at which testimony was taken. The Record was left open for further evidence and testimony until March 26, 1996.

As part of its application the school submitted a CEQR Environmental Assessment Statement (R4).

The School filed the following environmental studies: CEQR Environmental Assessment Statement (hereinafter "EAS") submitted October 24, 1995 (R84-113); revised EAS submitted December 7, 1995 (R126-160); revised pages 7a and 7b submitted December 13, 1995 (R175); EAS update submitted to the BSA March 15, 1996 (R320-327); Cerami & Associates report on acoustics and noise study, dated March 26, 1996, received by the BSA March 28, 1996 (R413-414); and Cerami & Associates report on acoustics and noise study dated April 10, 1996, received by the BSA April 11, 1996 (R425).

The following lists BSA correspondence with the School regarding the sufficiencies of its environmental submissions and the School's responses: BSA letter of November 9, 1995 (R120-121); Vandor and Vandor (hereinafter "Vandor") letter dated December 4, 1995, received by the BSA December 7, 1995 (R124-160); BSA letter of December 12, 1995 (R174); Vandor letter dated December 12, 1995, received by the BSA December 13, 1995 (R175); Vandor letter dated March 13, 1995 (sic), received by the BSA March 15, 1996 (R320-327); Cerami & Associates (hereinafter "Cerami") letter dated March 26, 1996, received by the BSA March 28, 1996 (R413-414); BSA letter of April 8, 1996 (R423); Battle Fowler letter of April 11, 1996 (R424); and Cerami letter dated April 10, 1996, received by the BSA April 11, 1996 (R425).

The School hired an acoustical consultant to analyze any potential noise impacts from rooftop air conditioning equipment proposed. In accordance with the recommendations the School agreed to screen and relocate the equipment to maximize compliance with the New York City Noise Control Code (R413-414 and 425-426).

On March, 15, 1995, the BSA received a submission from the School which pointed out an omission in an earlier submission, and provided updated information to the BSA. The submission disclosed the location of the premises as adjacent to a historic district, and provided supporting documentation. The applicant directed copies of the submission to various persons, including Eddie Baca, Chair at Community Board 11, and various elected officials (R320-327).

At the request of the BSA, the City of New York Landmarks Preservation Commission (hereinafter "LPC"), as an interested agency to the Environmental Review found "no archaeological significance"; "Designated New York City Landmark or within Designated Historic District"; and "appears to be eligible for National Register Listing and/or New York City Landmark Designation". In its letter to the BSA dated March 22, 1996, the LPC commented that "the project site is adjacent to the Expanded Carnegie Hill Historic District

(NYC listed and eligible for National Register listing), and no adverse impacts anticipated” (R395).

The Board conducted an environmental review of the proposed action and took a “hard look” at all relevant areas of environmental concern including neighborhood character, community facilities, open space, historic and archaeological resource, parking, transportation, and noise (R132-157). The BSA determined that the proposed action would cause no foreseeable significant environmental impacts that would require the preparation of an Environmental Impact Statement if the conditions in the Negative Declaration were met.

The Negative Declaration provides for the following:

- a. all work shall substantially conform to drawings as they apply to the objection above noted, filed with this application marked “Received December 12, 1995” -(1) sheet and “March 1, 1996” -(32) sheets; and
- b. HVAC equipment shall be screened and located in accordance with BSA approved plans and shall comply with all applicable rules and regulations, including the New York City Noise Control Code.

The Public Hearing was continued on March 26, 1996 (R447) at which testimony was taken and evidence received. On April 23, 1996 the resolution was issued (R1).

BSA RESOLUTION

At a meeting on April 23, 1996, the BSA adopted the following resolution by a vote of 4 to 0:

BSA RESOLUTION -

WHEREAS, the decision of the Borough Commissioner, dated October 2, 1995, acting on N.B. Applic. #101078735, reads:

“Proposed enlargement of a school building partially in an R7-2 district and partially in an R9 (PI) District exceeds the permissible height within the initial setback distance contrary to Section 24-522 of the Zoning Resolution”; and

WHEREAS, Community Board No. #11, Manhattan, has recommended approval of this application; and

WHEREAS, a public hearing was held on this application on February 27, 1996 after due notice by publication in the Bulletin, laid over to March 26, 1996 and then to April 23, 1996 for decision; and

WHEREAS, the premises and surrounding area had a site and neighborhood examination by a committee of the Board consisting of Chairman Gaston Silva, R.A., Vice-Chair Robert E. Flahive, P.E., Commissioner James Chin and Commissioner Rosemary F. Palladino, J.D.; and

WHEREAS, this is an application filed under Z.R. § 73-461 to permit the proposed enlargement of an existing school building (Use Group 3) located in an R7-2 and R-9 (PI) district, by expansion of the fifth floor and construction of a sixth and seventh floor, which exceeds the permissible height within the initial setback distance and requires a special permit pursuant to Z.R. §24-522; and

WHEREAS, the subject lot is a large lot fronting on E. 98th Street located primarily in an R7-2 district with a small portion located in an R9 district and is developed with a five-story not-for-profit school;

WHEREAS, the school was originally constructed in 1915 as a four story building with a fifth story later added to a portion of the building that encroached into the sky exposure plane pursuant to a special permit granted by the Board under Cal. No. 970-87-BZ;

WHEREAS, it is now proposed to expand the fifth floor onto the roof of the existing four story west wing and add a sixth and seventh floor to the building that would exceed the maximum 85' height of the front wall of the building in the R9 zoning district and the maximum 60' height of the front wall of the building in the R7 district within the 20' required setback; and

WHEREAS, specifically, the school intends to reconfigure several existing floors and add approximately 21,732 square feet of new space to the building to house a new science facility in the new west wing of the fifth floor, add new classrooms, seminar rooms and a teaching theater on the sixth floor, construct a new gymnasium with a basketball court and locker rooms on the seventh floor and install a new elevator and penthouse for mechanical equipment; and

WHEREAS, the school has adequately demonstrated that the modification of the height and setback regulations sought is required in order to enable the school to continue to provide its essential educational service to the community; and

WHEREAS, for example, as reasons for the proposed enlargement the school has pointed to its increased enrollment, changing technological needs, inadequate facilities and its

need to add a kindergarten to attract students and continue to provide a high quality elementary school education; and

WHEREAS, the school has submitted a summary of a recommendation from the New York State Association of Independent Schools ("NYSAIS") after an evaluation of the school conducted in 1995 that suggested the school should consider adding an additional gymnasium and locker room facility, as well as expanded facilities for science and drama, among other improvements; and

WHEREAS, the proposed enlargement will allow the school to add two kindergarten classes, provide a separate outdoor play area for these children, upgrade its science and music facilities, provide a teaching theater, locate all classes for each grade on a single level and organize the classes for each of the school's three divisions on contiguous floors; and

WHEREAS, the proposed enlargement will also allow the school to expand its physical education facilities to provide additional gymnasium space with an adequately sized playing area with safety margins around the perimeter and sideline seating for participants and spectators, allowing better coordination of its recess and physical education classes; and

WHEREAS, the school has demonstrated that without this proposed modification, there is no way to design and construct the new enlargement in a satisfactory physical relationship to the existing building on the site so as to produce an integrated development; and

WHEREAS, for example, the school contends that the split zoning on the lot and applicable bulk regulations related thereto would limit the size of a floor plate in an as-of-right building, create functional inefficiencies in dispersing students and faculty over a larger number

of floors and eliminate floor area necessary to meet the school's programmatic needs because of the required installation of an elevator; and

WHEREAS, the school has also demonstrated that an alternative plan analyzed by the school would require a variance of applicable zoning regulations, as well as a modification of height and setback regulations by special permit, and would create an enlarged building that would be closer to the rear wall of the buildings on the north side of E. 97th Street and also affect courtyard windows facing east on the adjacent building located at 1165 Fifth Avenue; and

WHEREAS, the school has further demonstrated that the proposed modification is the minimum necessary to permit the development of an integrated school facility and thereby create the least detriment to the character of the neighborhood and the use of nearby zoning lots; and

WHEREAS, for example, an as-of-right enlargement of the building would actually make it taller and reduce light and air to the adjacent residential buildings located on the north side of East 97th Street; and

WHEREAS, by contrast, this proposal will have a proposed street wall significantly reduced in height from what would otherwise be permitted as-of-right and will rise to a height which is more consistent with the height of many neighboring midblock street walls and the surrounding neighborhood character; and

WHEREAS, the school's proposal will still be significantly less than the maximum floor area ratio and fully comply with the lot coverage permitted in these residential districts; and

WHEREAS, the Board has carefully analyzed an alternative plan submitted by residents of neighborhood buildings appearing in opposition to this proposal (“the opposition”) and finds that this proposal would not permit the school to have a integrated facility of a sufficient size and configuration to meet the school’s programmatic needs; and

WHEREAS, specifically, the alternative plan submitted by the opposition for a smaller enlargement would not provide contiguous classroom space and adequately sized facilities needed to accommodate the school’s programmatic needs and would disrupt the school’s operations during construction and require expensive demolition and construction of a new structure with additional load bearing capacity; and

WHEREAS, although the Board acknowledges that the light and air of some windows in adjacent buildings will be affected by the applicant’s proposal, it notes that those windows affected are lot line windows which are not legally protected under the New York City Administrative Code and that, at most, there will be three additional lot line windows affected by this proposal that are in the setback that would be required with an as-of-right enlargement; and

WHEREAS, finally, the school has hired an acoustical consultant to analyze any potential noise impacts from rooftop air conditioning equipment proposed and has screened and relocate [sic] this equipment to maximize compliance with the New York City Noise Control Code; and

WHEREAS, the totality of the evidence presented thus demonstrates that the proposed enlargement is the only practical and feasible design to produce an integrated community facility which will meet this school’s educational needs with the least impact on the adjacent lots and surrounding neighborhood; and

WHEREAS, the Board has determined that the evidence in the record supports the findings to be made under Z.R. § 73-641; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has taken a “hard look” at all relevant areas of environmental concern;

WHEREAS, the evidence demonstrates no foreseeable significant environmental impacts that would require the preparation of an Environmental Impact Statement; and

WHEREAS, therefore, the Board has determined that the proposed action will not result in any significant environmental effects;

Therefore, it is Resolved that the Board of Standards and Appeals issue a Type I Negative Declaration under 6 N.Y.C.R.R. Part 617 and §6-07(b) of the Rules of Procedure for City Environmental Quality Review and makes the required findings and *grants* a special permit under Z.R. §73-641 to permit, the proposed enlargement of an existing school building (Use Group 3) located in an R7-2 and R-9 (PI) district, by expansion of the fifth floor and construction of a sixth and seventh floor, which exceeds the permissible height within the initial setback distance and requires a special permit pursuant to Z.R. §24-522; *on condition* that all work shall substantially conform to drawings as they apply to the objection above noted, filed with this application marked “Received December 12, 1995” -(1) sheet and “March 1, 1996” -(32) sheets; and *on further condition*;

THAT HVAC equipment shall be screened and located in accordance with BSA approved plans and shall comply with all applicable rules and regulations, including the New York City Noise Control Code;

THAT the above conditions shall appear on the certificate of occupancy;

THAT the development, as approved, is subject to verification by the Department of Buildings for compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code and any other relevant laws under the jurisdiction of the Department; and

THAT substantial construction shall be completed in accordance with Z.R. §73-70.

RELEVANT STATUTORY PROVISIONS

New York City Charter, Charter 27 Board of Standards and Appeals provides, in

relevant part:

§ 659. **Constitution and appointment.** a. There shall be an independent board of standards and appeals located within the office of administrative trials and hearings. The board of standards and appeals shall consist of five members to be termed commissioners to be appointed by the mayor each for a term of six years.

b. One of the members shall be a planner with professional qualifications and at least ten years' experience as a planner. One of the members shall be a registered architect and shall have had at least ten years' experience as an architect. One of the members shall be a licensed professional engineer and shall have had at least ten years' experience as an engineer. The mayor shall designate one of the members, who shall have the required experience as an architect, planner or an engineer, to serve as chair and shall designate one of the members to serve as vice-chair, who shall act as chair in the absence of the chair or in the event that a vacancy exists in the office of chair. Of the members, no more than two shall be residents of any one borough.

* * *

§ 666. Jurisdiction

The Board shall have power:

* * *

11. To issue such special permits as the board is authorized to issue under the zoning resolution.

§ 668. Variance and Special Permits.

a. Community boards and borough boards shall review applications to vary the zoning resolution and applications for special permits within the jurisdiction of the board of standards and appeals under the zoning resolution pursuant to the following procedures:

1. Each proposal or application shall be filed with the board of standards and appeals, which shall forward a copy within five days to the community board for each community district in which the land involved, or any part thereof, is located...

* * *

5. If after receipt of such a recommendation or waiver from every community or borough board involved, or the expiration of the time allowed for such boards to act, the applicant for a special permit or variance submits to the board of standards and appeals any additional documents or plans, he or she shall at the same time forward copies of such documents or plans to the city planning commission, the council member involved and to the community; or borough board involved.

* * *

b. The recommendation of a community board or borough board pursuant to subdivision (a) of this section shall be filed with the board of standards and appeals and a copy sent to the city planning commission. The board of standards and appeals shall conduct a public hearing and act on the proposed application. A decision of the Board shall indicate whether each of the specific requirements of the zoning resolution for the granting of variances have been met and shall include findings of facts with regard to each such requirement.

Zoning Resolution §§ 72-00 through 72-01 reads, in relevant part, as follows:

NEW YORK CITY ZONING RESOLUTION

**72-00 POWERS OF THE
BOARD OF
STANDARDS AND
APPEALS**

72-01 General Provisions

The Board of Standards and Appeals (referred to hereinafter as the Board) shall have the power, pursuant to the provisions of the New York City Charter and of this Resolution, after public notice and hearing:

* * *

(c) to hear, decide applications for such special permits as are set forth in the Resolution and are more specifically enumerated in Section 73-01 (General Provisions)

Zoning Resolution § 73-01 permits the issuance of special permits in accordance with the provisions set forth in the Zoning Resolution. Zoning Resolution § 73-01(b) provides that the Board of Standards and Appeals may permit specified modifications of the *use* or *bulk* regulations of the Zoning Resolution. Zoning Resolution § 73-03 provides, in relevant part, that the BSA has the power to grant special permits provided that the Board make all of the findings required in the applicable sections of the ZR, and finds that the hazards or disadvantages to the community at large of such special permit are outweighed by the advantages to be derived by the community by the grant of such special permit.

Zoning Resolution § 73-60 et seq. governs Modifications of Bulk Regulations. ZR § 73-61 contains general provisions and provides that the Board of Standards and Appeals shall have the power to permit modification of the bulk regulations of the Zoning Resolution.

Zoning Resolution § 73-64 provides as follows:

73-64 (6/27/63)

Modifications For Community Facility Uses

On a zoning lot occupied by any of the community facility uses specified herein, and in all districts where such uses are permitted as-of-right or by special permit, the Board of Standards and Appeals may permit developments or enlargements or such uses, which do not comply with certain applicable district bulk regulations, in accordance with the provisions of this Section.

Such specified community facility uses are:

* * *

Schools

Zoning Resolution § 73-641 provides that the BSA may permit modification of specified provisions of the Zoning Resolution, provided that each of three findings of fact are made, as follows:

73-641 (12/15/61)

Integration of new buildings or enlargements with existing buildings

For any such development or enlargement, subject to the required findings set forth in this Section, the Board of Standards and Appeals may permit modifications of the applicable regulations in Sections 24-38, 33-28, or 43-28 (Special Provisions for Through Lots), or in Sections 24-51 to 24-55, inclusive, Sections 33-41 to 33-45, inclusive, or Sections 43-41 to 43-45, inclusive, relating to Height and Setback Regulations, or in Sections 24-61 to 24-65, inclusive, Section 33-51, or Section 43-51, relating to Court Regulations and Minimum Distance between Windows and Walls or Lot Lines, provided that on December 15, 1961 the applicant owned the zoning lot or any portion thereof, and continuously occupied and used one or more buildings located thereon for a specified community facility use, from December 15, 1961 until the time of application.

As a condition of granting such modification, the Board shall find:

- (a) that such modification is required in order to enable such use to provide an essential service to the community.
- (b) that without such modification there is no way to design and construct new buildings or enlargements in satisfactory physical relationships to the existing buildings which are to remain upon the site, so as to produce an integrated development; and
- (c) that such modification is the minimum modification necessary to permit the development of such integrated community facility, and thereby creates the least detriment to the character of the neighborhood and the use of nearby zoning lots.

Zoning Resolution § 24-522, which encompasses R7 and R9 districts provides the following:

24-522(6/29/94)

Front Setbacks in Districts where front yards are not required.

- (a) In the districts indicated, where front yards are not required,

if the front wall or other portion of a building or other structure is located at the street line or within the initial setback distance set forth in the following table, the height of such front walls or other portion of a building or other structure shall not exceed the maximum height above curb level set forth in the table. Above such specified maximum height and beyond the initial setback distance, the building or other structure shall not penetrate the sky exposure plane set forth in the table:

The table provides in relevant part, that in R9 zoning districts, the height of the front wall of a building is limited to the lesser of 85 feet or nine stories above curb level. In R7 zoning districts, the height of the front wall is limited to the lesser of 60 feet or six stories above curb level. Above the specified maximum height in R9 and R7 zoning districts, Section 24-50 requires a building on a narrow street to be set back 20 feet from the front lot line and not to penetrate a sky exposure plane of 2.7 to 1.

ARGUMENT

POINT I

THE DETERMINATION MADE BY THE BOARD OF STANDARDS AND APPEALS SHOULD BE UPHELD BY THE COURT IN THAT THERE WAS A RATIONAL BASIS IN THE RECORD FOR THE RESPONDENTS' FINDINGS PURSUANT TO THE ZONING RESOLUTION

A. The Standard for Judicial Review is Whether or not the BSA's Determination had a Rational Basis

In an Article 78 proceeding to review the determination of an administrative body, the Court's function is limited to scrutinizing the record to confirm that the challenged determination has a rational basis and is not arbitrary and capricious. CPLR §7803; Matter of Pell v. Board of Education of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamaroneck, 34 N.Y.2d 222, 230-231 (1974); V.R. Equities v. New York City Conciliation and Appeals Board, 118 A.D.2d 459 (1st Dept. 1986); Matter of Civil Service Employees' Association v. Narcotic Addiction Control Commission, 45 A.D.2d 685, 686 (1st Dept. 1974), aff'd, 40 N.Y.2d 874 (1976).

Where the Court finds a reasonable basis in fact for the administrative determination, its function is exhausted. 300 Gramatan Avenue Associates v. Division of Human Rights, 45 N.Y.2d 176 (1978); Matter of Pell v. Board of Education, supra. The Court may not weigh the evidence presented in an administrative proceeding or substitute its judgment for that of the administrative body. Matter of Newbrand v. City of Yonkers, 285 N.Y. 164, 177 (1941); Matter of Zeidler v. Board of Supervisors of Suffolk County, 35 A.D.2d 54 (2d Dept. 1970). And the Court need not be "convinced of the 'rightness' of the challenged determination

so long as there can be reasoned probability of the fact found by the administrative body.”
Matter of Phinn v. Kross, 8 A.D.2d 132, 137 (1st Dept. 1959).

The applicability of this standard to zoning determinations has long been confirmed by the courts. See, e.g., Matter of Cowan v. Kern, 41 N.Y.2d 591, 599 (1977); Matter of Fiore v. Zoning Board of Appeals, 21 N.Y.2d 393, 396 (1968). It is a well established rule that local zoning boards have discretion in considering applications for special permits and the judicial function is a limited one. Matter of Fuhst v. Foley, 45 N.Y.2d 441, 444 (1978). The reviewing court cannot substitute its judgment for that of the local zoning body. Rather it is the function of the court to determine whether there is in the record a rational basis for the exercise of administrative discretion; if so, the challenged determination must be sustained. Matter of Cowan v. Kern, *supra*; Conley v. Town of Brookhaven Zoning Board of Appeals, 40 N.Y.2d 309, 314 (1976). As the Court of Appeals stated in Matter of Cowan v. Kern, *supra*,

Where there is a rational basis for the local decision, that decision should be sustained. It matters not whether, in close cases, a court would have, or should have, decided the matter differently. The judicial responsibility is to review zoning decisions but not, absent proof of arbitrary and unreasonable action, to make them. 41 N.Y.2d at 599.

In the City of New York, the BSA is the local zoning body empowered to issue special permits pursuant to the applicable provisions of the Zoning Resolution. New York City Charter § 666; ZR § 72-01; and §§ 73-01 et seq. The determination challenged in this Article 78 proceeding was made by the BSA, following the conduct of hearings and the receipt of evidence, pursuant to Charter § 668 and Zoning Resolution § 73-641.

It is respectfully submitted, therefore, that this Court’s review of the determination of Respondents, is limited to consideration as to whether there was a rational basis to support the BSA’s granting of the said special permit upon the Board’s finding that the

applicant met the three findings in ZR § 73-641, and that the disadvantages of the modification pursuant to the special permit to the community at large are outweighed by the advantages to the community by the grant of the special permit (ZR § 73-03). See, Ferman v. Board of Appeals, supra, at 883; Goldstein v. Arbon, 65 A.D.2d 782 (2d Dept., 1978); Mandell v. Purcell, supra, at 935; see, e.g., Peter Pan Playland, Inc. v. Foley, et. al. Constituting the Board of Standards and Appeals of the City of New York, 3 A.D.2d 246 (2d Dept., 1961).

The BSA's determination to issue the special permit in this case was a reasonable and proper exercise of its authority inasmuch as there is substantial evidence in the Record before the BSA to establish each and every one of the specified findings of fact required by the Zoning Resolution, as is more fully set forth in Point II, below.

B. Upon the Determination That The Application Satisfied the Conditions For the Grant Of A Special Permit Pursuant To The Zoning Resolution, Respondents Properly Granted The Special Permit

Respondents submit that inasmuch as they reasonably determined that the application satisfied the conditions for the grant of a special permit set forth in Zoning Resolution, their grant of the special permit here challenged was proper. The courts have consistently held that where the statutory conditions for a special permit have been met, the local body must grant the permit. Matter of Carrol's Development Corp. v. Gibson, 53 N.Y.2d 813; affirming 73 A.D.2d 1050 (4th Dept. 1980). As the court explained in Matter of Knight v. Bodkin, 41 A.D.2d 413 (2d Dept. 1973): "[t]he issuance of [a special permit] is a duty, imposed upon the zoning board once it is shown that the proposed [modification] meets the standards prescribed by the ordinance." Id. at 417. See also, Matter of Peter Pan Games of Bayside v. Board of Estimate, 67 A.D.2d 925 (2d Dept. 1979); Matter of Pleasant Valley Home

Construction v. Van Wagner, 53 A.D.2d 863 (2d Dept. 1976), aff'd, 41 N.Y.2d 1028 (1977); Matter of Goldstein v. Board of Zoning Appeals, 113 Misc. 2d 756 (Sup. Ct. Nassau Co. 1982).

The Courts have explained that a special permit or exception is the authority to use property in a manner expressly permitted. This is in contrast to a variance which seeks the authority to use property in a manner forbidden by an ordinance. (See Matter of North Shore Steak House v. Board of Appeals, 30 N.Y.2d 238 (1972); Matter of Texaco Refining & Marketing, Inc. v. Valente, 174 A.D.2d 674 (2d Dept. 1991); Matter of C & A Carbone, Inc. v. Holbrook, 188 A.D.2d 599 (2d Dept. 1992).) Furthermore, the courts have held that a classification permitting a special permit is tantamount to a legislative determination that, if the special permit or exception conditions are met, such a use will not adversely affect the neighborhood. (See, Matter of Lee Realty Co. v. Village of Spring Valley, 61 N.Y. 2d 892 (1984); Matter of North Shore Steak House v. Board of Appeals, supra.; Matter of Orange and Rockland County Utilities, Inc. v. Town Board of the Town of Stony Point, 214 A.D.2d 573 (2d Dept. 1995); Matter of C & A Carbone, Inc. v. Holbrook, supra.)

Once an applicant shows that the contemplated use is in conformance with the conditions imposed, the special permit must be granted unless there are reasonable grounds for denying it that are supported by substantial evidence. (See, Matter of Carrol's Development Corp. v. Gibson, supra; Matter of Texaco Refining & Marketing, Inc. v. Valente, supra; Matter of C & A Carbone, Inc. v. Holbrook, supra.)

Moreover, the an applicant's burden of proof is much lighter than the heavy burden required for a variance. (See, Matter of Carrol's Development Corp. v. Gibson, supra; Matter of North Shore Steak House v. Board of Appeals, supra.; Green v. LoGrande, 96 A.D.2d 524 (2d Dept. 1983); Matter of C & A Carbone, Inc. v. Holbrook, supra.) Conclusory assertions,

generalized objections or concerns in opposition to an application are insufficient to sustain the denial of a special permit. (See, *Matter of Lee Realty Co. v. Village of Spring Valley*, *supra*; *Matter of Market Square Properties v. Town of Guilderland Zoning Board of Appeals*, 66 N.Y.2d 893 (1985); *Matter of Markowitz v. Town Board of Oyster Bay*, 200 A.D.2d 673 (2d Dept. 1994); *C.B.H. Properties, Inc. v. Rose*, 205 A.D.2d 686 (2d Dept. 1994); *Matter of C & A Carbone, Inc. v. Holbrook*, *supra*; *Matter of Orange and Rockland County Utilities, Inc. v. Town Board of the Town of Stony Point*, *supra*; *Veysey v. Zoning Board of Appeals of the City of Glens Falls*, 154 A.D.2d 819 (3rd Dept. 1989).)

New York City Charter § 666(11) provides that the BSA is empowered to issue special permits pursuant to the applicable provisions of the Zoning Resolution. Zoning Resolution § 73-641 provides that the BSA may issue special permits which permit modification of the applicable provisions of certain sections of the Zoning Resolution. The special permit sought and issued herein merely permits the School to erect front walls to a height that exceeds the maximum height permissible for these particular zoning lots without the specified setbacks.⁷ See DOB objection (R3). Zoning Resolution § 73-641 specifically allows permits to be granted to modify the regulations set forth in § 24-522 which include the Height and Setback Regulations for certain districts, provided that certain findings of fact are made. Accordingly, once the BSA determined that the applicable findings were met, it properly issued the special permit.

Petitioner alleges that in granting the special permit, the BSA relied primarily on the preferred zoning status generally accorded to educational and religious institutions under the law (see Petitioner's Memorandum of Law in Support of Petition, p. 18). Contrary to petitioner's assertions, the application for the special permit was not accorded any preferred

treatment. Rather, the BSA, in granting the special permit, made the findings required under the Zoning Resolution for the granting of a special permit, and accordingly determined that the granting of the special permit was proper. Petitioner's allegation that any preference was accorded to the school in the issuance of the special permit is incorrect.⁸

Upon a determination that the application met the findings required by the Zoning Resolution (§§ 73-03, 73-641), the BSA was required to issue the special permit.

⁷ However, the project as proposed can be constructed for the most part on an as-of-right basis, and can otherwise be built higher than proposed, as-of-right.

⁸ However, the law in New York State requires that special consideration be given to religious and educational institutions in zoning matters (as is more fully set out in Point III, below).

POINT II
**THE BSA PROPERLY MADE ALL THE
FINDINGS REQUIRED BY ZONING
RESOLUTION**

**A. The BSA Properly Made The Finding
Pursuant to ZR § 73-641(a)-That Such
Modification Is Required In Order To Enable
Such Use To Provide An Essential Service To The
Community.**

The School has pursued its educational mission in its East 98th Street location for eighty years, during which time it has been a resource for boys from surrounding communities. Since the 1987-88 academic year, the year in which St. Bernard's last applied to the BSA for a special permit to expand the Building, enrollment has increased from 319 students to the current 331 students. The addition of a kindergarten would increase enrollment to approximately 371 students (R10).

The proposed enlargement is necessary due to the increase in enrollment, together with changing technological needs, inadequate facilities, and the need to add a kindergarten to attract students and continue to provide a high quality elementary education. The School submitted a summary of a recommendation from the New York State Association of Independent Schools after an evaluation of the School conducted in 1995, that suggested the School should consider adding an additional gymnasium and locker room facility, as well as expanded facilities for science and drama, among other improvements (R227-243). It is apparent that satisfying the space needs is essential if the School is to continue to perform its mission of providing the highest quality education to students of elementary and intermediate school grade levels.

The proposed enlargement will allow the School to add two kindergarten classes, provide a separate outdoor play area for these children, upgrade its science and music facilities, provide a teaching theater, locate all classes for each grade on a single level and organize the

classes for each of the school's three divisions on contiguous floors. The proposed enlargement will also allow the school to expand its physical education facilities to provide additional gymnasium space with an adequately sized playing area with safety margins around the perimeter and sideline seating for participants and spectators, allowing better coordination of its recess and physical education classes (R22-28).

Accordingly the BSA found that the School has adequately demonstrated that the modification of the height and setback regulations sought is required in order to enable the School to continue to provide its essential educational service to the community. The petitioners have not contested this finding.

B. The BSA Properly Made The Finding Pursuant to ZR § 73-641(b)-That Without Such Modification There Is No Way To Design And Construct The New Buildings Or Enlargements In Satisfactory Physical Relationships To The Existing Buildings Which Are To Remain Upon The Site, So As To Produce An Integrated Development.

The School has demonstrated that without the proposed modification, there is no way to design and construct the new enlargement in a satisfactory physical relationship to the existing building on the site so as to produce an integrated development (ZR § 73-641(b).)

For example, the split zoning on the lot and applicable bulk regulations related thereto would limit the size of a floor plate in an as-of-right building, create functional inefficiencies in dispersing students and faculty over a larger number of floors and eliminate floor area necessary to meet the School's programmatic needs because of the required installation of an elevator (R28-29).

The School has also demonstrated that an alternative plan analyzed by the School would require a variance of applicable zoning regulations, as well as a modification of height and

setback regulations by special permit, and would create an enlarged building that would be closer to the rear wall of the buildings on the north side of E. 97th Street and also affect courtyard windows facing east on the adjacent building located at 1165 Fifth Avenue (R 396-404, 423-434).

Petitioners' imply that the BSA erred in failing to consider every imaginable alternative which are not included in the record. However, such a standard would be impossible to meet and therefore absurd. In addition, it is clearly not the law. (See, Matter of Lee Realty Co. v. Village of Spring Valley, *supra*; Matter of Market Square Properties v. Town of Guilderland Zoning Board of Appeals, *supra*; Matter of Markowitz v. Town Board of Oyster Bay, *supra*; C.B.H. Properties, Inc. v. Rose, *supra*; Matter of C& A Carbone, Inc. v. Holbrook, *supra*; Matter of Orange and Rockland County Utilities, Inc. v. Town Board of the Town of Stony Point, *supra*; Veysey v. Zoning Board of Appeals of the City of Glens Falls, *supra*.) The BSA has fulfilled the requirements of the law by making a rational determination based upon the evidence in the record. (See Point I, above.)

Finally, the petitioners speculate that there may have been alternative plans which were not produced or made a part of the record, which could theoretically provide an alternative way to design and construct the enlargement without the modification. Such conclusory assertions are insufficient to sustain the denial of a special permit. (See, Matter of Lee Realty Co. v. Village of Spring Valley, *supra*; Matter of Market Square Properties v. Town of Guilderland Zoning Board of Appeals, *supra*; Matter of Markowitz v. Town Board of Oyster Bay, *supra*; C.B.H. Properties, Inc. v. Rose, *supra*; Matter of C& A Carbone, Inc. v. Holbrook, *supra*; Matter of Orange and Rockland County Utilities, Inc. v. Town Board of the Town of Stony Point, *supra*; Veysey v. Zoning Board of Appeals of the City of Glens Falls, *supra*.)

Accordingly, the evidence in the record supports the BSA's finding pursuant to ZR§ 73-641(b) that without the proposed modification, there is no way to design and construct the new enlargement in a satisfactory physical relationship to the existing building on the site so as to produce an integrated development.

C. The BSA Properly Made the Finding Pursuant to ZR § 7-641(c)-The Modification Granted Was The Minimum Necessary.

The evidence in the Record supports the BSA's finding that the special permit issued was the minimum necessary to permit the development of such integrated community facility, and thereby creates the least detriment to the character of the neighborhood and the use of nearby zoning lots. (ZR § 73-641(c).)

The evidence in the record demonstrates that the addition proposed is necessary to address the School's programmatic needs. First, the building must be able to accommodate the School's programmatic needs, which include: the addition of two kindergarten classes, a separate outdoor play area for these children, an upgrade of the science and music facilities, provision of a teaching theater, locating all classes for each grade on a single level, organizing the classes for each of the school's three divisions on contiguous floors; and expansion of its physical education facilities (R12-31).

Petitioners' state that they do not object to any of the School's proposed programmatic changes, but for the size of the proposed gymnasium. (Petitioners' Memorandum of Law in Support of the Petition, page 2.) However, they imply that the BSA erred in not challenging the School on its stated programmatic needs. (Petitioners' Memorandum of Law in Support of the Petition, page 25.) Contrary to the petitioners' assertions, it was not appropriate for the BSA to challenge the School concerning its stated programmatic needs, since they were reasonably associated with the School's educational purpose.

The School is entitled to locate on their property facilities for such social, recreational, athletic and other accessory uses as are reasonably associated with their educational purpose. The Courts of New York State have held that local zoning boards are not permitted to evaluate the educational propriety of a school's programmatic decisions, provided that they do not have an adverse impact on the welfare of the community. In Summit School v. Neugent, 82 A.D.2d 463; 442 N.Y.S.2d 73 (2d Dept. 1981), for instance, the Court held that it is "...in excess of the legislative power conferred upon a municipality, to impose, as a condition of a special use permit for a private school, the details of the operation of the educational processes of the institution..." (See also, North Shore Hebrew Academy v. Wegman, 105 A.D.2d 702 (2d Dept. 1984), app. dismd. 64 N.Y.2d 1040 (1985).) As stated by the Court in Lawrence School Corporation v. Lewis, 174 A.D.2d 42; 578 N.Y.S.2d 627 (2d Dept. 1992) in considering an expansion of a use by a school stated "Moreover, educational and religious institutions are generally entitled to locate on their property facilities for such social, recreational, athletic and other accessory uses as are reasonably associated with their educational or religious purposes. (See also, Brown v. Board of Trustees, 303 N.Y.484; Community Synagogue v. Bates, 1 N.Y.2d 445; 154 N.Y.S.2d 15; 136 N.E.2d 488 (1956); Shaffer v. Temple Beth Emeth, 198 A.D. 607; Summit School v. Neugent, 82 A.D. 2d 463.)"

In any event, the record contains independent evidence supporting the school's stated programmatic need. Indeed, the BSA requested independent evidence which documented the programmatic need for the requested modifications (R485). In response to the request, the School submitted a summary of recommendations from the New York State Association of Independent Schools which had evaluated the school in 1995. The report suggested numerous improvements to the school, including; expanded facilities for science and drama, additional

space for the proposed new kindergarten, additional space for the infirmary, additional space for offices, additional storage space for records and supplies, and other improvements. In addition, central to the report was the recommendation for the addition of an additional gymnasium and locker room facility (R227-243).

Furthermore, the record demonstrates that without the modification, the size of the floor plate is limited in an as-of-right building so as to create functional inefficiencies in dispersing students and faculty over a larger number of floors. Such a design would eliminate floor area necessary to meet the School's programmatic needs because of the required addition of an elevator (R4).

The evidence in the record also demonstrates that the modification is necessary to meet the School's programmatic needs, with the least detriment to the character of the neighborhood and nearby zoning lots. For example, an as-of-right enlargement of the building would actually make the building taller and reduce light and air to the adjacent residential buildings located on the north side of East 97th Street. By contrast, this project will have a front wall significantly reduced in height from what would otherwise be permitted as-of-right and will rise to a height which is more consistent with the height of many neighboring midblock buildings which establish the overall character of the area. Furthermore, the School's proposal will still be significantly less than the maximum floor area ratio and fully comply with the lot coverage permitted in these residential districts (R4, 280-311).

The Board analyzed an alternative plan submitted by residents of neighborhood buildings appearing in opposition to this proposal ("the opposition") and found that this proposal would not permit the School to have a integrated facility of a sufficient size and configuration to meet the School's programmatic needs. Specifically, the alternative plan submitted by the

opposition for a smaller enlargement would not provide contiguous classroom space and adequately sized facilities needed to accommodate the School's programmatic needs and would disrupt the School's operations during construction and require expensive demolition and construction of a new structure with additional load bearing capacity (R396-404, 423-434).

Petitioners' again imply that the BSA erred in failing to consider every imaginable alternative which are not included in the record. However, such a standard would be impossible to meet and therefore absurd. In addition, it is clearly not the law. (See, Matter of Lee Realty Co. v. Village of Spring Valley, *supra*; Matter of Market Square Properties v. Town of Guilderland Zoning Board of Appeals, *supra*; Matter of Markowitz v. Town Board of Oyster Bay, *supra*; C.B.H. Properties, Inc. v. Rose, *supra*; Matter of C& A Carbone, Inc. v. Holbrook, *supra*; Matter of Orange and Rockland County Utilities, Inc. v. Town Board of the Town of Stony Point, *supra*; Veysey v. Zoning Board of Appeals of the City of Glens Falls, *supra*.) Again, the BSA has fulfilled the requirements of the law by making a rational finding based upon the evidence in the record. (See Point I, above.)

Finally, the petitioners again speculate that there may have been alternative plans which were not produced or made a part of the record, which could theoretically establish that the School's proposal is not the minimum necessary. As has been previously set forth, such conclusory assertions are insufficient to sustain the denial of a special permit. (See Point II B, above.)

The record clearly demonstrates that the proposed building is the minimum modification necessary to permit the development of such integrated community facility, and thereby creates the least detriment to the character of the neighborhood and the use of nearby zoning lots.

In conclusion the Record amply supports the BSA's issuance of a special permit. All of the findings required by ZR § 73-641 have properly been made.

**D. The BSA Properly Made the Findings
Required By Zoning Resolution § 73-01 et seq.
Inclusive of § 73-03 (a)**

Zoning Resolution § 73-01 permits the issuance of special permits in accordance with the provisions set forth in the Zoning Resolution. Zoning Resolution § 73-01(b) provides that the Board of Standards and Appeals may permit specified modifications of the *use* or *bulk* regulations of the Zoning Resolution. Zoning Resolution § 73-03 provides, in relevant part, that the BSA has the power to grant special permits provided that the Board make all of the findings required in the applicable sections of the ZR⁹, and finds that the hazards or disadvantages to the community at large of such special permit are outweighed by the advantages to be derived by the community by the grant of such special permit.

In the instant case, the BSA weighed the evidence presented in the record and made an exhaustive analysis which resulted in the findings required pursuant to ZR § 73-641, and which is reflected in the Board Resolution. Accordingly, the BSA found that the hazards or disadvantages to the community at large of such special permit are outweighed by the advantages to be derived by the community by the grant of such special permit. Indeed, the finding required pursuant to § 73-03 is merely a more generalized finding than the specific findings required pursuant to § 73-641. In essence, by engaging in an analysis of the evidence in the record, to determine whether the proposal met the required findings pursuant to § 73-641, the Board also arrived at the general finding required by § 73-03. As stated by the court in Matter of Buitenkant v. Robohm, 122 A.D.2d 791 (2nd Dept. 1986) "the standards governing the issuance of special

⁹ In this instance the applicable provision of the Zoning Resolution is § 73-641.

use permits set forth in [the town's ordinance] are general in nature....the fact that the Town Board did not make specific findings of fact in support of its determination does not invalidate its determination since it can be adequately ascertained from a review of the record that the decision...had a rational basis.

Petitioners imply that the finding was not properly made as it did not track the language of the statute. Contrary to petitioners' allegations, there is no requirement that the finding contain any particular language or words. Petitioners' suggestion that such is the case puts form over substance, and is not the law (See, ZR § 73-01 et seq., and Matter of Buitenkant v. Robohm, supra). In addition, this directly contradicts petitioners' allegations concerning the other findings made pursuant to § 73-641, wherein petitioners imply that the findings are improper in that they track the language of the statute. Therefore, as explained above, the respondents clearly made an appropriate analysis and arrived at the finding required by Zoning Resolution § 73-03.

There can be no doubt that the Record supports the BSA's finding, pursuant to § 73-03, that the advantages of issuing the special permit outweigh the disadvantages to the community at large. To begin with the "use" of the premises for an educational purpose has not been challenged and is fully in accord with the Zoning Resolution, which specifies that educational uses do not create significant objectionable influences in residential areas. The premises, which has been used for educational purposes for approximately eighty years (R10), is Use Group 3 which, according to the Zoning Resolution, "can perform [its] activities more effectively in a residential environment" and "do[es] not create significant objectionable influences in residential areas." (ZR § 22-13.) In Neddermeyer, and The Healing Church, Inc. v. Town of Ontario Planning Board, 155 A.D.2d 908; 548 N.Y.S.2d 951 (4th Dept. 1989) the Court

explained that inclusion of an institution in a zoning district "...is tantamount to a legislative determination that the use is in harmony with the general surrounding area" (citing Taylor v. Foley, 122 A.D.2d 205, 207). Similarly, the court in Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y.2d 508; 154 N.Y.S.2d 849; 136 N.E.2d 827 (1956) stated "church and school and accessory uses are, in themselves, clearly in furtherance of the public morals and general welfare..." and that "Noise and other inconveniences have been held to be insufficient grounds upon which to deny a permit..." Id. at 525, 526. Furthermore, the courts have held that a statute provision allowing the issuance of a special permit is tantamount to a legislative determination that, if the special permit or exception conditions are met, such a use will not adversely affect the neighborhood. (See, Matter of Lee Realty Co. v. Village of Spring Valley, supra; Matter of North Shore Steak House v. Board of Appeals, supra; Matter of Orange and Rockland County Utilities, Inc. v. Town Board of the Town of Stony Point, supra; Matter of C&A Carbone, Inc. v. Holbrook, supra.)

In addition, the record shows that the School can build as-of-right higher and with more floor area than is being proposed, and that an as-of-right enlargement would reduce light and air to the adjacent residential buildings on the north side of East 97th Street. The School's proposal to build to a permitted height without the required setback will result in a front wall significantly reduced in height from what would be permitted as-of-right and one which will rise to a height that is more consistent with the height of many neighboring midblock buildings in the surrounding neighborhood (R4, 280-311). Contrary to the petitioner's unsupported allegations, there is nothing in the record to show that the granting of the special permit to accommodate the programmatic needs of the School would have any detrimental impact on the community at large.

In addition, the project is supported by Community Board 11, and numerous area residents (see Statement of Material Facts, above). Moreover, the premises and surrounding area had a site and neighborhood examination by the five BSA Commissioners.

In considering the application, the Board analyzed the proposed project, as well as suggested alternatives, as reflected in the Resolution. The Board also looked closely at the proposal and weighed its affect on the community at large. For example, the Board conducted an environmental review of the proposed action and took a "hard look" at all relevant areas of environmental concern including neighborhood character, community facilities, open space, historic and archaeological resource, parking, transportation, and noise (R126-160). At the request of the BSA, the City of New York Landmarks Preservation Commission, as an interested agency to the Environmental Review, found that no adverse impacts were anticipated (R395). The BSA reviewed the report of an acoustical consultant to analyze any potential noise impacts from rooftop air conditioning equipment proposed (R413-414 and 425-426). In accordance with the recommendations the School agreed to screen and relocate the equipment to maximize compliance with the New York City Noise Control Code. The BSA determined that the proposed action would cause no foreseeable significant environmental impacts that would require the preparation of an Environmental Impact Statement if the conditions in the Negative Declaration were met (R1). Accordingly, the BSA found that the hazards or disadvantages to the community at large of such special permit are outweighed by the advantages to be derived by the community by the grant of such special permit.

Furthermore, the Board weighed the impact of the proposal on the adjacent lots and surrounding neighborhood. For example, the BSA acknowledged that there would be an impact on the three lot line windows of a neighboring building (R1). Contrary to petitioners'

claims, respondents do not claim that lot line windows are illegal. However, it is undisputable that there is no legal protection for lot line windows. The New York City Administrative Code § 27-331 provides, in relevant part, that "Exterior walls shall comply with the fire-resistance rating requirements of table 3-4. Under New York City Administrative Code Section 27-271 and Table 3-4 no openings may be made on a building located within three feet of a lot line unless the Department of Buildings authorizes the opening. In addition, where "any neighboring building is later altered or constructed to come within the above distance limitation, the affected exterior openings shall immediately be closed..." (New York City Administrative Code Section 27-271, Table 3-4, Note b; and R366). In the instant case, most of the lot line windows affected by the construction would be impacted by an as-of-right enlargement. At most there are three additional lot line windows affected by this proposal that are in the setback that would be required with an as-of-right enlargement (R470-471). In addition, an alternative as-of-right building could potentially have an even greater impact on light and air than a building constructed with the special permit pursuant to this proposal (R4.)

Furthermore, the Board issued a Negative Declaration which contained certain requirements intended to protect the surrounding neighborhood, as follows:

- a. all work shall substantially conform to drawings as they apply to the objection above noted, filed with this application marked "Received December 12, 1995" -(1) sheet and "March 1, 1996" -(32) sheets; and
- b. HVAC equipment shall be screened and located in accordance with BSA approved plans and shall comply with all applicable rules and regulations, including the New York City Noise Control Code.

(R1).

As explained above, there were are no foreseeable adverse impacts on the community at large, as a result of the issuance of the special permit. In addition, an enhanced

educational institution is a great benefit to a community. The evidence in the record supports the BSA determination pursuant to ZR § 73-03 that the hazards or disadvantages to the community at large of such special permit are outweighed by the advantages to be derived by the community by the grant of such special permit. As a result, the BSA properly made the finding required by ZR § 73-03.

POINT III
**THE LAWS OF THE STATE OF NEW YORK
ACCORD A PREFERRED STATUS UNDER
ZONING LAWS FOR RELIGIOUS AND
EDUCATIONAL USES**

The decision of the BSA to grant a special permit is consistent with the laws of New York State. The School met the criteria set out in the Zoning Resolution for the granting of the special permit (as is more fully explained above). In addition, in New York, the Courts have long recognized the preferred zoning status of educational and religious institutions. Because of the special services they provide, such institutions may not be as closely regulated as other uses. As was stated in Ginzberg v. Yeshiva of Far Rockaway, 45 A.D.2d 334, 337 (2d Dept., 1974), aff'd 36 N.Y.2d 706 (1975): "... [A]ll schools, public and private, and religious institutions are protected from the full impact of zoning restrictions because of their contribution to the public welfare. It is well established in New York that "...Churches and schools occupy a different status from mere commercial enterprises and, when the church enters the picture, different considerations apply***Thus church and school and accessory uses are, in themselves, clearly in furtherance of the public morals and general welfare..." Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y.2d 508 at 523, 526; (1956). See also Westchester Reform Temple v. Brown, supra. In Cornell University v. Bagnardi, 68 N.Y.2d 583 (1985), the Court enunciated the standard that educational and religious institutions enjoy a presumptively favored status with respect to the police powers sought to be protected by zoning laws. The Court found:

Because of the inherently beneficial nature of churches and schools to the public, we held that the total exclusion of such institutions from a residential district serves no end that is reasonably related to the morals, health, welfare and safety of the community (Diocese of Rochester v. Planning Board of Town of Brighton, 1 N.Y.2d 508 at 522 (1956)). Since a municipality's power to regulate land use is derived solely from its right to use its

police powers to promote these goals, such total exclusion is beyond the scope of the localities' zoning authority (citations omitted.)

In accordance with this special status, it has consistently been held that religious and educational institutions, must be permitted in residentially zoned areas. In the case of Genesis Assembly of God v. Davies, 208 A.D.2d 627; 617 N.Y.S.2d 202; (2d Dept. 1994) the court found that "It is well settled that, while religious institutions are not exempt from local zoning laws, greater flexibility is required in evaluating an application for another use and every effort to accommodate the religious use must be made." Id. at 628. Furthermore, while the Courts have held that the favorable zoning status accorded for religious and educational uses is not unlimited, those limits extend only to factors involving the health, safety or welfare of the public (see Cornell University v. Bagnardi, supra; and Holy Spirit Association for the Unification of World Christianity v. Rosenfeld, 91 A.D.2d 190; 458 N.Y.S.2d 920 (2d Dept. 1983) which required a direct or immediate adverse effect on the health, safety or welfare of the community) and even then "[I]t is incumbent upon a local zoning board to suggest measures to accommodate the proposed religious use while mitigating the adverse effects on the surrounding community to the greatest extent possible." Genesis Assembly of God v. Davies, supra at 628. (See also Islamic Society of Westchester and Rockland, Inc. v. Foley, 96 A.D.2d 536; 464 N.Y.S.2d 844 (2d Dept. 1983); Harrison Orthodox Minyan, Inc., v. Town Board of Harrison, 159 A.D.2d 572; 552 N.Y.S.2d 434 (2d Dept. 1990); and Young Israel of North Woodmere v. Town of Hempstead Board of Zoning Appeals, 634 N.Y.S.2d 199 (App. Div. 2d Dept. 1995).)

In the recent case of Apostolic Holiness Church v. Zoning Board of Appeals of the Town of Babylon, 633 N.Y.S.2d 321; (App. Div. 2d Dept. 1995) the Appellate Division found that while the zoning Board's concerns over traffic were legitimate, the requested variance

could not be denied for those reasons as those concerns could be adequately addressed by the imposition of conditions. Although the local Zoning Board had considered the required four factors for the granting of the variance under the local Zoning ordinance, and denied the variance, the Court found that the special status enjoyed by religious institutions required the granting of the variance (subject to reasonable conditions which address the legitimate community concerns.)

Petitioner incorrectly argues that the preferred status accorded to educational and religious institutions only applies to situations involving the use of property. (See Petitioners' Memorandum of Law in Support of Petition, p. 16.) The cases demonstrate that, once established, a zoning ordinance may not place unreasonable restrictions on the ability of religious or educational institutions to expand in order that they may continue to fulfill their special responsibilities. Westchester Reform Temple v. Brown, *supra* at 493 (1968); Board of Education v. City of Buffalo, 57 Misc.2d 472 (Sup. Ct. Erie Co. 1968) *aff'd* 32 A.D.2d 98 (4th Dept. 1969); Anderson, New York Zoning Law and Practice §11.09 (3rd Ed. 1984) ("It is clear that restrictions on educational uses must be reasonable. Such uses must be permitted to expand with the growing need for their services. . . .")

The fact that these facilities may interfere with the use or enjoyment of surrounding dwellings is not a sufficient basis for preventing their establishment or expansion in residential districts. As the court explained in Brandeis School v. Village of Lawrence, 18 Misc.2d 550 (Sup. Ct. Nassau Co. 1959):

[Schools and churches] are regarded as occupying a status difference from other uses. Cf. Diocese of Rochester v. Planning Board, 1 N.Y.2d 508, 523, 154 N.Y.S.2d 849, 863. Schools, like other places in which people are assembled in large numbers, produce effects such as noise, traffic congestion and

attendant hazards to safety. Such conditions may be expected to have a tendency to disrupt the peace and quiet of a residential neighborhood and tend to cause a depreciation of property values. Such effects have been found a sufficient basis for excluding buildings other than schools or churches. But such considerations have not been regarded as sufficient to justify exclusion of churches and schools in this state. The possibility of such undeniable effects appears to be considered outweighed by the social values of such institutions.

The application of this rule is illustrated by the decision of the Appellate Division, Second Department in North Shore Hebrew Academy v. Wegman, *supra*. Petitioner therein was a Jewish day school located in a residential district of the Village of Kings Point. Several years after it began operating, petitioner applied to respondent Village Board of Trustees for a special zoning permit to conduct Sunday classes. Following a hearing, respondents denied the application on the ground that such Sunday activity “with its attendant noise and traffic, is an unwarranted interference with the peaceful use and enjoyment of the properties in the neighborhood.” *Id.* at 704. Petitioner thereupon challenged the denial of its application in an Article 78 proceeding. Special Term affirmed respondents’ determination. However, on appeal the Appellate Division reversed. It noted that “[t]he case law on the zoning regulation of religious and educational institutions has consistently held that a municipality has an affirmative obligation to adopt less restrictive alternatives to completely barring such an institution from locating or expanding its facilities in a residential neighborhood” (emphasis added). *Id.* at 706. Accordingly, the Court concluded that “the board of trustees may not prohibit the academy from conducting the Sunday educational and religious program for the same reasons which would justify the exclusion of commercial activities, including the disruption of the tranquility customarily enjoyed by neighboring property owners on Sunday mornings by the noise and

automobile traffic generated or expected to be generated by the academy's center for the performing arts." *Id.* at 705.

In the case of Community Synagogue v. Bates, *supra*, the court permitted an expansion reasoning that a synagogue was intended to provide more than mere worship, such as a social function. It found "to limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation." (*Id.* at 453.) Similarly, in Lawrence School Corporation v. Lewis, *supra*, where a day school sought to expand a use by adding 2 swimming pools to expand its summer program, the court permitted the expansion of the use, reasoning: "Moreover, educational and religious institutions are generally entitled to locate on their property facilities for such social, recreational, athletic and other accessory uses as are reasonably associated with their educational or religious purposes." (See Brown v. Board of Trustees, *supra*; Community Synagogue v. Bates, *supra*; Shaffer v. Temple Beth Emeth, *supra*; Summit School v. Neugent, *supra*.)

In the instant case, the BSA applied the standards required for the issuance of a special permit under the Zoning Resolution (§ 73-641); determined that each requirement had been met; and accordingly issued the special permit to the School. Petitioner incorrectly alleges that a preference given to the School was the determinative factor in the issuance of the special permit. The cases demonstrate that educational institutions enjoy a special status under the zoning laws, although no special consideration was given to the School in this instance. Accordingly, the special permit issued to the School is not only rational but fully consistent with the special zoning status which has uniformly been accorded to religious and educational institutions.

CONCLUSION

**THE BSA'S DECISION TO GRANT A
SPECIAL PERMIT IS SUPPORTED BY THE
LAW AND THE FACTS. THEREFORE
PETITIONERS' APPLICATION SHOULD BE
DENIED IN ALL RESPECTS AND THE
PETITION DISMISSED**

Dated: New York, New York
September 9, 1996

PAUL A. CROTTY
Corporation Counsel of the
City of New York
Attorney for Respondents
100 Church Street, Room
New York, New York 10007
(212) 788-0821

SHERRILL KURLAND
On the memorandum



HEAD OF SCHOOL

June 5, 2013

Hon. Meenakshi Srinivasan, Chair
&
Members of the Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Dear Chair Srinivasan:

I am a Dalton alumna and have served as Head of School since July 1, 2001. The education I received here prepared me for the challenges of my career and has served me throughout my life. I am deeply committed to, and have forged an enduring bond with, Dalton, its students, faculty, parents, and the greater community.

Dalton is an independent, co-educational day school (K-12), founded in 1919 by the renowned progressive educator Helen Parkhurst. Her visionary Dalton Plan remains the keystone of the school's progressive educational philosophy. Dalton is recognized for its rigorous, innovative educational curriculum and offers its 1,305 students a stimulating and challenging program taught by our dedicated faculty. Our students are from all walks of life in New York City. We are actively committed to having a diverse community and enrolling students with wide ranging talents, background and experience. In 2012, 21% of Dalton students received financial aid, amounting to 16% of tuition dollars.

Dalton is comprised of the following: (i) The Upper School, located at 108 East 89th Street (the "Building,") consisting of the Middle School (grades four through eight) and the High School (grades nine through twelve), totaling 929 students; (ii) The Lower School, located at 51 East 91st Street, comprised of the First Program (kindergarten through third grade), totaling 376 students; (iii) the Physical Education Center, located at 200 East 87th Street; and (iv) 120 East 89th Street (the "120 Building"), which adjoins the Building and is used for offices.

While Dalton's program is highly regarded, we are unable to fully offer our students a program that effectively utilizes the latest developments in technology and new methods of teaching and learning because the Building's existing classrooms and other spaces are fully utilized. Dalton, the school born of the experimental Laboratory Plan, has always been and must continue to be a forward-looking school.

New courses that have been added in just the last ten years include robotics, engineering, a science research program, “pop foods,” and the math team, and courses that have expanded in this time include computer science, Mandarin, extending foreign language into the 5th grade and creative writing. Due, in part, to these new and expanded offerings, there is now no room in the Building for any new courses or additional sections of existing courses.

This is why it is imperative that Dalton expand. We propose construction of a two-story, 12,200 square foot enlargement (the “Enlargement”) on the roof of the Building which would contain two specialized robotics and engineering facilities, each of which takes up the space of two or three regular classrooms, a long-term science research lab, and a greenhouse (the “New Facilities”), as well as three new classrooms.

Dalton has, whenever possible, expanded into nearby facilities: In 1992, Dalton needed additional classroom space and entered into a lease at 200 East 87th Street to build the Physical Education Center so it could convert the Building’s gym to classroom space. Subsequently, Dalton’s program expanded due to the addition of new courses and additional sections of existing courses, and Dalton entered into a lease for space in the 120 Building, so offices could be relocated from the Building to provide additional classroom space. Dalton’s demand for office space has been increasing. In the 2002-2003 academic year, Dalton had 123 full-time faculty members in the Building while in 2012-2013 Dalton has 137 full-time faculty members in the Building. The lack of sufficient office space is also a problem for our “Labs,” one of the 3 pillars of Dalton. Teachers have inadequate room to prepare for classes and Lab meetings are often held with students sitting in between two teachers at a table in the faculty office that an entire department’s faculty shares, with little privacy for the students.

However, the New Facilities cannot be placed anywhere but in the Enlargement. The Building is currently utilized to the maximum extent feasible. We cannot expand in 200 East 87th Street because the rest of this building is occupied by co-op apartments. Nor can we lease additional space in the 120 Building, because (i) the rest of the 120 Building is rented as apartments, (ii) only the 1st floor of the 120 Building is near the same elevation as the floors of the Building and (iii) our current lease expires on June 30, 2020, so even if we could obtain additional useful space in the 120 Building, the future of our existing space would be in doubt when the lease expires. In fact, there is no assurance that this office space will be renewable, and finding expansion space off-site is not an option. For instance, traveling to the off-site Physical Education Center diminishes class time.

Dalton has done everything possible to fulfill its programmatic needs in its current structures and has diligently sought alternative solutions to its space and crowding issues prior to this application. However, the limitations of the Building have prevented Dalton from providing its students with the education program it must provide, especially in the sciences.

At present, Dalton’s STEM program (science, technology, engineering and mathematics education) is not at the level it needs to be. The part of the program most in need of improvement is technology and engineering. Therefore the Enlargement would consist primarily of new STEM facilities wherein Dalton will be able to improve and expand its STEM program by having sufficient space for engineering and robotics instruction, design, construction and

testing, using cutting edge equipment, allowing more students, including our Middle Schoolers, to study engineering, robotics and computer science and offer a greater variety of courses in these areas. The Enlargement will also include science research lab space and a greenhouse, which will permit a greater diversification of our science offerings and allow more students to engage in independent research projects, in addition to new classroom space for Dalton to add additional sections of popular classes or new subjects its faculty would like to teach. In sum, the Enlargement will permit Dalton to provide greatly improved educational opportunities to its students.

Dalton is committed to providing an excellent education that meets each student's interests, abilities, and needs and promotes an appreciation for diversity in our community as an integral part of school life. Dalton challenges each student to develop intellectual independence, creativity and curiosity and a sense of responsibility toward others both within the school and in the community at large. Guided by the Dalton Plan, we prepare students to be not only academically strong graduates, but also informed, intuitive, and responsible social citizens. In order to accomplish these objectives and further our mission, it is essential that we be able to expand.

In view of the above, I respectfully request that the Board approve Dalton's application.

Sincerely,

A handwritten signature in cursive script, reading "Ellen C. Stein".

Ellen Cohen Stein '65

Head of School

BA University of Pennsylvania

MBA Columbia Business School



June 5, 2013

Hon. Meenakshi Srinivasan, Chair
&
Members of the Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Dear Chair Srinivasan:

I am a chemistry teacher at Dalton and have served as Dalton's scheduler since 2004. I am responsible for creating class schedules for Dalton's students and assigning the rooms in which classes are held.

I am providing you with the schedules for each room in our building at 108 E. 89th Street where classes meet in a typical week during the 2012-2013 school year. Most classes meet three out of four days between Monday and Thursday, and three out of every four Fridays in a month. The schedules for each of the four Fridays in a month are provided. There are 8 periods in a school day. In addition to instructional classes, the room schedules show the periods when a room is used by House or Preceptors (tutors), for which students do not receive course credit, as well as Peer Mentoring (students receive credit for serving as peer mentors).

The rooms in the building are used as follows:

1. Room 100 is the Green Room for the theater. It is very small and has no windows.
2. Room 150 is not a classroom. It is an office used by High School Preceptors.
3. Room 205 is also not a classroom. It is a small conference room and is used only for Peer Mentoring.
4. The following are classrooms used by the High School, which are interchangeable and have no special features: 251, 252, 301, 311, 350, 501, 503, 505, 507, 601, 603, 604, 605, 608, 609, 610, and 612.
5. Room 510 is a faculty office used by English and foreign language teachers. It is used only for House and is not suitable for instructional space.
6. Room 607 is a faculty office used by the history teachers. It is used only for House and is not suitable for instructional space.
7. The following are classrooms used almost exclusively by 6th grade students: 703, 705, 706, 707, 807 and 809.
8. The following are classrooms used almost exclusively by 7th grade students: 701, 708, 710, 805, 808 and 810.

9. The following are classrooms used almost exclusively by 8th grade students: 704, 711, 801, 803, 1001, 1105.
10. The following are classrooms designed for use by science classes (which are used by all grades in the building), though non-science classes can and do meet in these rooms (because of the unavailability of other rooms in the building): 401, 403, 405, 406 A, 410, 413, 415, and 450.
11. The following are classrooms used only by 4th grade students. They have smaller furniture and grade-specific materials and cannot be used by any other students: 905, 907, 908, 909 and 910.
12. The following are classrooms used only by 5th grade students. They have smaller furniture and grade-specific materials and cannot be used by any other students: 901, 903, 906, 1102 and 1104.
13. Room 406 is used for storage and observation of independent science research projects and labs with teachers throughout each school day. House and a few sections of Peer Tutoring meet here.
14. Room 502-504 is the computer science classroom, with part of the room used for lecture and the other part for problem sets. There are computers arranged along the wall and it is not suitable for other instructional space.
15. Room 902 has only two 6-seat tables and is a small room. It is supposed to be used only by the Preceptors but is used for a few sections of Math and English Workshops.
16. Room 1103 is the architecture lab, with computers around the side of room and no regular tables. It is not suitable as use for other instructional space
17. The following classrooms have stools and easels rather than regular classroom desks and are used for art classes only, since they are not suitable as use for other instructional space: 1201, 1203, 1205, 1207, 1209.
18. Room 1204 is a ceramics classroom. It has only benches, rather than regular tables, and is not suitable as use for other instructional space.
19. Room 1206 is the woodworking room. It has only workbenches, rather than regular tables, and is not suitable as use for other instructional space.
20. Room 1107 is the darkroom.
21. B06 is a multi-purpose room used as a dance studio, music classroom and black box theater. It has no tables or chairs, and is not suitable as use for other instructional space.
22. The following are music rooms which have no tables, only music stands, and are not suitable for use as other instructional space: B01, B02, B03, and B05, B10. Note that none of the rooms on the cellar level have windows, and only three have skylights.

In reviewing the room schedules, a few points should be noted.

1. Dalton schedules its lunch periods for grades 6-12 as follows:
 - 4th period- 6th grade lunch
 - 5th period- 7th and 8th grade lunch
 - 6th period- High School lunch

2. Dalton schedules its gym periods for grades 6-12 as follows:
 - 6th grade: Period 3 and part of period 4, every day but Monday
 - 7th and 8th grade: 8th period, every day but Wednesday
 - High School: Monday, Tuesday and Thursday 1st period, 5th period every day but Wednesday, and Wednesday 8th period.

The entire 6th grade, and the entire 7th and 8th grade, goes to gym at the same time, and each student in these grades has gym four times a week. High school students have gym twice a week, and between 25 and 50 high school students have gym at the same time.

3. High School students have assembly in the auditorium every Wednesday during 5th period.

Many of the periods in which the room schedules show the classrooms are not being used for a class are because the students who would otherwise use these rooms are at lunch, gym or assembly.

As you can see, the periods in which rooms are unoccupied are quite rare and scattered throughout the school day. The main reason for this is because Dalton believes the ideal learning time in a day is different for each student so, to be fair to all students, Dalton rotates the periods that each class meets.

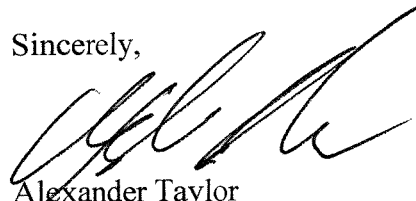
The utilization rate of Dalton's classrooms is very high. It would be extremely difficult to increase the utilization rate because it is very hard to match the occasional scattered room availability with both student and teacher availability.

Our classrooms are utilized at a very high rate. That rate has increased since I have become the schedule, in part, because the average number of courses a student takes has increased in recent years. My predecessor, Chuck Rice, who was scheduler from 1974-2004 has advised that in the early 1990s, the great majority of Dalton students only took five core academic classes (math, history, English, foreign language, and science). I understand from my Dalton colleagues that in 2000-2001, students took an average of 5.18 academic classes, while in 2012-2013, students took an average of 5.53 academic classes. This average is expected to rise in the future because students are taking more courses due, in part, to the increasingly competitive college applications process, whereby colleges are expecting applicants to take a greater number of academically demanding courses.

The building has no standard student lounge or study hall to use as space for new instructional space. The High School student lounge on the 3rd floor is only 518 SF, and there is no official lounge area for the Middle School students, so students often congregate and study in hallways, frequently sitting on the floor. Nor can the cafeteria space be used for additional programming. The cafeteria is fully utilized, so much so that lunch periods are staggered with fourth graders eating lunch in their classrooms. Middle School lunch periods need to start at 10:45 AM and are limited to 25 minutes, and the cafeteria is constantly utilized for lunch until 1:35 PM. Before and after these times, the cafeteria is occupied by staff for preparation and clean-up.

Therefore, the classrooms in the building are utilized to the maximum extent feasible, and there is no non-classroom space that can be converted to instructional use.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alexander Taylor', written in a cursive style.

Alexander Taylor

B.A. Columbia University 1988

M.A. Columbia University Teachers College 1994



June 5, 2013

Hon. Meenakshi Srinivasan, Chair
&
Members of the Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

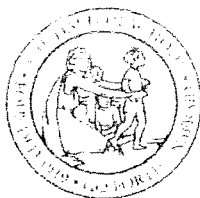
Dear Chair Srinivasan:

I have served as chair of Dalton's High School Registrar since January 2011. In this capacity I have detailed records regarding the courses taken by Dalton students.

In academic year 2000-2001, high school students took an average of 5.18 academic classes (math, history, English, foreign language, and science), while in academic year 2012-2013, students took an average of 5.53 academic classes.

Sincerely,

Jeff Slack
High School Registrar, Civic Engagement and Internship Program Director



July 17, 2013

Hon. Meenakshi Srinivasan, Chair
&
Members of the Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Dear Chair Srinivasan:

I have served as chair of Dalton's Computer Science Department since 2006. I consider myself extremely fortunate to be able to teach such an enthusiastic and intellectually curious group of students, especially in an area that has dramatically increased in popularity in just the last few years. With new developments in technology, the popularity of computer science will certainly increase in the coming years, as will its indispensability to students' future careers, both within and beyond the technological fields.

I work closely with the members of Dalton's Science Department and we are collaborating on developing a first-rate engineering program.

While engineering is one of the four cornerstones of STEM, Dalton's engineering program consists almost entirely of a single robotics course¹ (robotics combines elements of engineering and computer science) in which only 30 High School students are enrolled.

I believe the reason for the modest enrollment is the lack of a specialized engineering space which would allow students to construct and test their projects during the school day. Instead, such work now must take place after school or on Saturdays, which deters students who are on a team sport or play an instrument and have practices and games or other activities scheduled after school.

The need to construct and test robots after school causes additional difficulties. The robots are tested on a 12' x 12' robotics movement "field" where they perform their designed tasks, such as

¹ The only engineering course currently being offered is a course in Sustainable Engineering, which is part of the Science Department.

moving a ball from robot to robot up and down inclined planes. Because this activity occurs after normal school hours in the computer science classroom (Room 502-504), the first and last half hours of each after-school session is spent setting up and dismantling the movement field. A space such as the High School Facility would have a permanent movement field and eliminate this wasted hour. Also, without a specialized engineering space, robots have to be stored on the floor in Room 502. This limits the size of the robots that can be constructed, which curtails our participation in "FIRST."

FIRST is a 501(c)(3) not-for-profit organization devoted to helping young people discover and develop a passion for STEM. The 2011-2012 FIRST season attracted nearly 300,000 participants from over 60 countries, and its annual programs culminate in an international robotics competition. Due to its lack of facilities, Dalton is only able to participate in the lowest-level high school "FIRST" robotics program, the FIRST Tech Challenge.² With the High School Facility, Dalton will be able to participate in the FIRST Robotics Competition ("FRC"), the highest level FIRST competition, in which New York City public and independent schools such as Stuyvesant and Brooklyn Tech now compete.

The lack of a specialized space also prevents us from offering any standard engineering classes, such as electrical or mechanical engineering, or engineering classes which involve the creation of a model of an object and the subsequent assembly of such an object, a methodology known as prototyping, which needs a dedicated area for projects to be constructed and tested.

Based on my professional judgment and experience and that of other Dalton educators, we believe a large High School engineering/robotics laboratory (the "High School Facility") would address these and other deficiencies in our engineering program. For instance, a space such as the High School Facility would have a permanent movement field and eliminate the wasted hour setting up and dismantling the field described above. Also, Dalton would be able to participate in the FIRST Robotics Competition, the highest level FIRST competition, in which New York City public and independent schools such as Stuyvesant and Brooklyn Tech compete.

² The field used for FTC is based on foam tiles that must be set up inside of a steel wall frame. The field has other parts that are set up on top of it- these components vary from year to year, as determined by FIRST. Last year, the parts were a number of pipe components, and the year before, the parts were plywood ramps and other wood materials. The reason setting up and dismantling the movement field takes half an hour each is because of the number of parts that comprise the field.

STEM education should begin at an early age, but the absence of a specialized space does not allow Dalton to offer any engineering class to its Middle School students.³ Presently, a Middle School “robotics club” meets after school twice a week as a non-accredited course, causing some students to have to choose between the robotics club and after-school music, sports or other activities. A Middle School robotics/engineering lab (the “Middle School Facility”) would allow us to offer engineering to our Middle School students.

The High School Facility would include an approximately (i) 1,200 SF High School Engineering Lab, consisting of (a) Fabrication Laboratory Equipment, (b) Prototyping (Assembly) Space, (c) Engineering Equipment and (d) Robotics Area, and (ii) 480 SF Machine Room. It will introduce an innovative approach to engineering education that originated at the university level, specifically at MIT and Stanford, which is now being adopted in high schools and middle schools in other parts of the country, particularly in the west.

The two primary uses of the High School Facility will be by Dalton’s High School robotics and engineering classes.

A robotics class would use the Facility as follows: Each year, robotics classes are focused towards addressing the year’s particular challenge, which changes from year to year. For example, last year’s challenge involved needing to raise a basket full of balls as high as possible. Class sessions are often centered around a particular mechanical/control problem in the year’s challenge. In the proposed High School Engineering Lab (the components of which are described below), the robotics class would initially discuss the problem around the work tables (prototyping/assembly space described below). The problem is analyzed and broken into steps—for instance, in this problem, a robot would need to flip a crate containing balls, pick up the balls, drop the balls in the crate, pick up the crate, and lift the crate. Then, small teams would research possible solutions to these problems. Small models of the solutions that seem most promising (such as a particular part of a robot, such as an arm or grabbing device) would be built using the equipment in the Engineering Lab, including possibly the “Fab Lab” equipment described below. The models are then used to demonstrate the mechanical solutions and tested on the robotics field, part of the robotics area described below. The testing is an ongoing process which requires constant use of the robotics field, increasing the accuracy and proficiency of the robot. As the process progresses towards constructing a finished robot, the equipment and work benches in the

³ There are some engineering units in science courses, but no separate engineering courses.

Machine Room will be used, which will usually require the use of metal beams that will be milled and shaped in the machine room.

An engineering class would use the Facility as follows: An assignment for an engineering class would involve creating a clock. The class would start by meeting together as a group to discuss the clock assignment and then separate into smaller groups around the work tables in the Engineering Lab (the prototyping/assembly space). The video/green screen in the Engineering Lab may be used to interview experts via skype. In the smaller groups, the instructor would then lead brainstorming sessions which would use the moving white boards which will be in the lab. The class would then move towards a small prototyping phase (described below) where the class would build small models of the clocks they plan to build using paper, 3-dimensional printed models and laser cut pieces, which would require use of the "Fab Lab" equipment. In groups, the students would then present their models to each other, recording these presentations using the green screen. The class would then do another phase of prototyping where they would include electronic components, which would involve soldering and wiring using equipment such as the soldering oscilloscope that would be in the High School Engineering Lab (the engineering equipment). This work would occur in small groups, and projects would need to be stored between classes, in the storage space in the Lab. After this phase, there would be another round of group presentations at the green screen. This project would continue to a refined final product constructed in the Machine Shop.

A Fabrication Laboratory (also called a "Fab Lab") provides students the tools and techniques to rapidly translate an idea to reality. Generally, Fab Labs provide off-the-shelf industrial-grade fabrication and electronics tools with open source software to allow students to design and manufacture products. For instance, a three-dimensional model of a new type of circuit board can be designed and produced in a Fab Lab using a three-dimensional printer, one of the specialized Fab Lab equipment described below. Rather than printing on paper, such a printer produces a fully-assembled model of an object. A design of the model is created using specialized software, which is then uploaded to the three-dimensional printer. The printer then lays down successive layers of material (liquid, powder, paper or sheet), which are automatically fused to create the final, three-dimensional shape. The other specialized Fab Lab equipment can be used for cutting shapes and performing fine-scaled work as part of the modeling or prototyping process.⁴ Fab Labs include prototyping space, discussed below, which is an area where the models produced

⁴ <http://fab.cba.mit.edu/about/faq/>

by the Fab Lab equipment are conceived and designed, often through collaborative group work, and then refined and assembled.

The High School Engineering Lab will contain specialized Fab Lab equipment, likely consisting of a (a) laser cutter for cutting shapes out of various two dimensional materials such as plastic, wood, or metal, (b) computer numerical control (CNC) machine, which is an automated milling device that makes industrial components without direct human assistance, for 3-dimensional milling of various materials, (c) a small CNC machine for printed circuit boards and other fine-scale work, and (d) a 3-dimensional printer for printing 3-dimensional items out of plastic.

A Fab Lab greatly expands what can be taught and produced in an engineering class- a well known Fab Lab course is the "How to Make Almost Anything" class at MIT and Century College in Minnesota, a version of which we seek to introduce into its curriculum.

The Fab Lab concept was created by MIT, spread to other universities, and is now being implemented in a few high schools and middle schools, including Marymount, here in New York City. Marymount's Fab Lab, which is approximately 1,000 SF and serves around 300 total students.

Another potential use of the High School and Middle School Facilities is by Dalton's art classes to make use of the Fab Lab equipment located in such facilities, as other schools such as Marymount have done. This would allow Dalton to incorporate art into its STEM program so it can provide "STEAM" education, which is STEM with an art component, creating a multi-disciplinary education.

The High School Engineering Lab will have a prototyping (assembly) space⁵ containing six meeting/working tables which will accommodate up to approximately 16 students (and the instructor) that will be in the lab at a time (one class section). This space will have multiple uses. Engineering and robotics classes would use this space for the design, development, refinement

⁵ Prototyping in this context refers not to the creation of an advance model of a product before it is mass produced, but rather to the creation of an object, such as a part of a robot. For example, in the context of a robotics class, the project may be building a robot to raise a basket full of balls as high as possible. To address the problem, the class designs different robot parts, such as an arm or a grabbing device. Prototyping here refers to building small models of these robot parts, which are then tested to evaluate how well they work. If the part works well, the part is then built and becomes a part of the finished robot.

and assembly of the models produced by the specialized Fab Lab equipment.⁶ This space could also be used for group discussions and collaboration. There will also be white or cork boards for instruction and design. A video and green screen for 3-dimensional modeling, motion capture, online classes, and communication with experts will also be included in the Engineering Lab for use by both robotics and engineering classes (as discussed above).

The workbenches in the prototyping/assembly space will also contain assorted tools, including oscilloscopes, to be used by robotics and engineering students, as well as a prototyping station for building and testing scale models of robots or other engineering projects, and a lockable workbench for small drill press, miter saw, and power tools, which will be used for both robotics and engineering.

Such a prototyping space is at the Nueva School outside of San Francisco, a private K-8 school.

Dalton needs a robotics space, where students will learn how to design and build robots that do various tasks. The students will be able to construct robots from scratch or use pre-built or factory constructed robots to develop software. The nature of the robots that will be worked on will change frequently, so the space will need to have the tools to accommodate a series of vehicular robots, legged robots, flying robots, lifting or hoisting robots, robots to study grasp, and robots to study vision. An example of such a robotics space can be found at Dos Pueblos High School, a 9-12th grade public school in Galeta, California.

The High School Engineering Lab will contain a space for robotics, which will include a 12'X12' field for constructed robots to be programmed and tested (grasping hands, bipedal motion, multipods, flying vehicles) and to prepare for the FIRST Tech Challenge; elevated programming station that overlooks test field; storage for robot constructs; battery charging station; and overhead rigging and modular drive spaces with mounted cameras around test fields.

The Engineering Lab will also contain a soldering station with ventilation hood, storage for electronic components, including motor controllers and motors, and storage for raw materials, including aluminum, which will serve both engineering and robotics classes.

⁶ Several schools, such as Marymount, call both the Fab Lab equipment and the prototyping/assembly space the "Fab Lab."

The High School Facility will also include equipment and workspace for Dalton's new engineering classes. The engineering students will need engineering workstations and soldering and oscilloscope stations for working with electronics components, which will be in both the High School and Middle School Engineering Labs. A typical workstation contains function generators, oscilloscopes, frequency counter, high performance DC power supplies, three-phase autotransformers, power electronics converters, isolators, power meters, and multiple combinations of switches and different types of electrical loads.

We will introduce engineering courses such as electrical engineering and mechanical engineering. Such classes will utilize the Machine Room and the work benches therein, for making parts and constructing projects. Engineering classes will also use the work benches and tables, discussed above, in the High School and Middle School Engineering Labs for design, refinement and assembly of their projects, as well as for classroom instruction.

The approximately 480 SF Machine Room would consist of equipment such as a band saw, air compressor, table saw, welding station, lathe, pipe cutter, grinder, sander and drill press. It will also contain two 5' X 5' work tables, a work bench and storage space for stock, paint, power tools, a power vacuum cleaner, screws, nuts and bolts.

The room would be used by Dalton's engineering and robotics classes to create the parts for their robots and projects, which will be used in the High School Engineering Lab.

We estimate that between 85 and 110 High School students would take robotics if both the lecture and construction components of the course were provided during the school day, rather than after school and on weekends. Students will utilize both the Machine Room and the High School Engineering Lab, cutting parts for their robots in the Machine Room and constructing on the work benches and testing their projects on the robotics field in the Lab;

The High School Facility would also allow our students to be able to enter the FRC competition and this space is needed for the construction of larger projects such as solar cars and gravity vehicles, as well as for the components of the FRC field, some of which are up to 4' x 8' x 12';

Also, with this space we will be able to offer a variety of engineering electives, such as biological and electrical engineering, which require such a facility to construct and test projects, and we will be able to offer, as an accredited course, participation in the Science Olympiad, a citywide competition combining engineering and science, whereby students will use both the

Machine Room and the High School Engineering Lab, cutting parts for their projects, such as a “maglev” device that could propel a train using magnetic fields, in the former and refining and testing their projects in the latter.

Additionally, we would be able to integrate art into our STEM program, as Marymount has done, by offering new courses such as Computer Science and Art (Graphics) which need to utilize the specialized Fab Lab equipment.

The Middle School Facility, like the High School Engineering Lab, will contain (a) Fab Lab Equipment, (b) Prototyping/Assembly Space, (c) Robotics Area and (d) Engineering Equipment (the Machine Room will be used by both High School and Middle School students).

The facility will contain certain Fab Lab equipment such as a small laser cutter for cutting shapes out of two dimensional materials and a 3-dimensional printer for printing 3-dimensional items out of plastic.

The facility will also contain three tables and a work bench for design, fabrication, prototyping (assembly), testing of projects and instructional space (these tables will accommodate up to 16 Middle School students, the size of a typical course section). There will also be white or cork boards for instruction, collaboration and design, as well as storage space for a power vacuum cleaner, models, projects and materials, including wood, paper and metal.

The Fab Lab equipment and the prototyping (assembly) work space in the Middle School Facility will be used by the new Middle School engineering classes Dalton will introduce. For instance, an assignment in a fourth grade engineering class would include designing an LED. Rather than immediately jumping in with ideas about the “coolest” lamp design, students are told to go home and observe their family members and decide who most needed a new light source. Then the students have to design a lamp that suited that person’s needs and interests. The lamp would be designed on the white boards and tables in the Middle School Facility, and a model would then be produced on the 3-dimensional printer, one of the Fab Lab pieces of equipment in the Facility. Prototyping (assembly) of the lamp from parts made in the lab would take place on the work benches in the Facility. This is an innovative approach to engineering education being implemented at several schools, such as Marymount and the Nueva School.

The Middle School Facility will have space for robotics, containing the same equipment and items that will be in the High School Engineering Lab, except it will have two smaller robotics movement fields, totaling 12' x 16', one each for the FIRST Lego League and the RoboCupJr., the middle school FIRST competitions, and a robot storage and display for keeping old robots and demonstrating best construction practices.

A soldering station, similar to the one in the High School Engineering Lab, will be in the Middle School Facility so engineering classes can work with electronic components. Engineering classes will also use the work benches and tables, discussed above, for design, refinement and assembly of their projects, as well as for classroom instruction, which will also utilize the collaboration boards.

The Middle School Facility would allow Dalton to offer to Middle School students (i) robotics and other engineering courses, such as Intro to Lego Robotics, Scratch (Programming) and Intro to 3-Dimensional Modeling, and (ii) the opportunity to participate in the FIRST Lego League and the RoboCupJr., the middle school FIRST competitions.

There are 474 Middle School students. We estimate that approximately 250 of these students will enroll in the courses described above.

A core component of any engineering program is computer science. Because its skill set underlies so many professions today, even students not specializing in nor focused on science or math-based education should be proficient in some level of computer science. A basic computer science class requires a room with computer stations and a space for group work on problems. Dalton currently has one such combined room for its entire computer science program (Room 502-504). This room is occupied by classes during every available period and is used for "Lab" meetings during the other periods, such as lunch periods – Lab periods are especially critical in computer science classes due to the need for incremental adjustments to projects that require meetings between student and teacher with access to the equipment. The high utilization of Dalton's computer science room is caused by the dramatic increase in interest in computer science. In 2005, 43 High School students took computer science at Dalton; last year, 203 of the 455 High School students signed up to take the course, but only 184 were able to be enrolled. Dalton has completed its enrollment for next year and 254 students have signed up and they

expect even more students to sign up in the future.⁷ With the complete utilization of Dalton's one computer science classroom, no additional students can take computer science, nor can Dalton offer any computer science classes to Middle School students, or provide new computer science classes in a greater variety of subareas. Currently, the 9th, 10th and 12th grades meet only twice a week (11th graders meet four times a week).

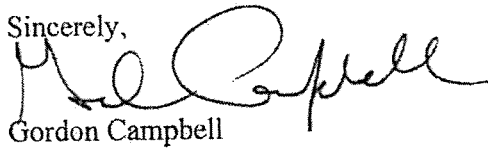
The demand for additional computer science classroom space would be met by the High School computer science/engineering classroom and the Middle School computer science/engineering classroom planned to be in the two-story enlargement on the roof of the building. The placement of these new computer science/engineering classrooms in proximity to the large High School engineering/robotics laboratory and the smaller Middle School robotics/engineering lab would allow specialized computer science and engineering classes to utilize the labs for construction of the projects they are designing in the classrooms.

The computer science classroom for High School students would allow (i) more High School students to take Computer Science courses and an increase in 9th and 10th grade classes from two to four per week; and (ii) the introduction of new electives, such as Artificial Intelligence, Cryptography, Web Frameworks and Advanced Data Structures. The Middle School computer science/engineering classroom is needed so we can offer computer science and engineering classes to Middle School students, such as Middle School Computer Science and Art (Graphics) and Intro to Drafting and Design.

⁷ Presently, scheduling for the next school year is in process and course enrollments have not yet been finalized, though it is expected that the number of High School students that will be able to be enrolled in computer science will be approximately the same as the 184 that were enrolled last year.

In sum, the new engineering/robotics labs and computer science classrooms would enable us to offer robotics, engineering and computer science classes to a greater number of students and help facilitate the development of an integrated computer engineering program. Such improvements will help prepare our students for the jobs of tomorrow by realizing the educational potential of today's technology.

Sincerely,

A handwritten signature in black ink, appearing to read "Gordon Campbell", written over the printed name.

Gordon Campbell

B.A University of New Hampshire
M.A. Columbia University



July 17, 2013

Hon. Meenakshi Srinivasan, Chair
&
Members of the Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Dear Chair Srinivasan:

We write to you in our respective capacities as outgoing and incoming chairs of Dalton's Science Department. Will Hopkins' tenure, which began in 2005, ended last month. Lisa Brizzolara will be chair for the school year commencing September 2013, and has been a member of Dalton's faculty since 2004.

STEM, or science, technology, engineering and mathematics education, is at the center of a nationwide push to transform education by reemphasizing the science-based fields. As leaders of Dalton's Science Department, we are committed to providing our students with a high quality science and engineering program in line with the objectives of the STEM movement. However, our program is lacking in several respects and it is not possible to expand or improve our program within the current confines of the school building.

Dalton requires High School students to take three years of science - 9th graders take biology, 10th graders take chemistry and approximately 80% of 11th graders take physics, with the remaining 20% taking a second biology or chemistry course or another science elective. Most 12th graders elect to take a science course; the number of 11th and 12th graders taking two science classes has more than doubled since 2008. All Middle School students are required to take a science class each year.

Dalton's science rooms, which are on the fourth floor, cannot accommodate additional classes. They are occupied by classes during nearly 90% of the periods, and during many of the remaining periods these rooms are used for the student-teacher Lab sessions.

Consequently, there is no laboratory space for students to participate in long-term in-house research projects that can be performed in our building, as part of the Dalton Research Program. Instead, the only students who can perform long-term research projects are the few who can be placed with outside institutions such as the Rockefeller Institute for Medical Research. This past year only 12 of the 48

students who signed up for the DRP could be so placed; the other 36 students could not perform experiments and had to limit their work to theory.

The lack of laboratory space also affects 9th grade biology projects. Because of space constraints, projects must be chosen which can be completed in 1/3rd of the school year, rather than giving students the option to do projects that will take more time, up to the full year.

Dalton's science program can be strengthened by constructing a science research laboratory (the "Science Research Lab") so that all interested students can perform research projects that could last for up to four years and 9th graders could choose year-long biology projects.

We also lack a greenhouse facility which could be used to grow food and for agricultural studies, experiments with nutrient recycling and energy conservation, studies of plant function and growth, sunlight experiments and independent projects. This especially hurts our biology program.

As mentioned above, Dalton's science program can be improved through the addition of the Science Research Lab and a greenhouse. The Science Research Lab should be 2-3 times the size of a regular classroom. We propose an approximately 1,200 SF Science Research Lab, which would have a "wet lab" for chemistry and biology research projects and experiments, and a "dry lab" for physics.

The Science Research Lab needs to be 1,200 SF to accommodate the over-75 research projects that Dalton estimates will be kept in the lab for storage and observation. In addition to the 75 upper-grade long-term research projects mentioned above, some 9th grade biology projects that may extend through the entire school year will also be placed in the limited space remaining in the Lab.¹ Room 406, which is currently used for the storage and observation of 9th grade biology research projects, is approximately 460 SF and contains about 33 projects. A typical 9th grade project would investigate the effects of different colored sand on the eating habits of hermit crabs. This would require three terrariums, housing the crabs with different colored sand, totaling approximately 30 inches x 50 inches (approximately 10.5 SF). A typical upper-grade project is similar to the 9th grade projects, but on a more sophisticated level, such as a thorough investigation of the learning behavior of an ant colony in a food maze, which would also require approximately 10.5 SF. The space needed by over 75 research projects requires a room of approximately 1,200 SF, for these projects and the students who will be tending to them.

¹ It is anticipated that Room 406 will continue to be used for storage and observation of approximately 33 of the 9th grade biology projects.

The Science Research Lab would greatly benefit Dalton and its STEM program. First, with respect to long-term research projects, this year 48 students signed up for independent research. However, the lack of a Science Research Lab meant that of these 48 students, the only students who could perform experiments were the 12 who could be placed at outside institutions. We estimate that construction of the Science Research Lab would increase research participation to approximately 75 students. Students could work on a project for multiple school years, some for all four years of High School.

Secondly, 9th grade biology projects could extend through the entire school year, rather than be restricted to only 1/3rd of the year, which would expand the range of possible projects and enhance the educational experience.

Lastly, new Science electives, such as Quantum Mechanics, Advanced Environmental Science, Evolutionary Ecology, Astronomy II, Electronics, and Marine Biology that require a lab could be taught.

We also propose an approximately 1,200 SF greenhouse, which would be used by (i) our Environmental Science class for food and agricultural studies, and experiments with nutrient recycling and energy conservation, (ii) biology classes, for studies on plant function and growth, (iii) other classes that have units on plants or sunlight, (iv) independent research projects or experiments involving plants and (v) Middle School and High School environmental clubs. Also, the food produced in the greenhouse could be used in the school cafeteria or to teach cooking lessons.

Dalton's science and engineering programs would be vastly improved by the facilities discussed in this letter. These new facilities would allow us to significantly upgrade our program and provide our students with an education that will better prepare them for the careers of the future, many of which are in the fields of science and engineering.

Sincerely,



Will Hopkins

BS Cornell University 1997
MS University of California, Berkeley 2000



Lisa Brizzolara

BA Fordham University 1990
MS in Biology Fordham University 1993
M.A.T. Fordham University 1996



June 5, 2013

Hon. Meenakshi Srinivasan, Chair

&

Members of the Board of Standards and Appeals

40 Rector Street - 9th Floor

New York, New York 10006

Dear Chair Srinivasan:

I have taught foreign language classes at Dalton and served as chair of Dalton's World/Classical Languages and Global Language Initiatives since September 2012.

Our foreign language program needs to be improved. Currently, Dalton's foreign language program starts in the 5th grade. Classes are held in regular classrooms, which lack language- and culture-specific materials, because of the lack of space available for foreign language-specific classrooms.

One of my prime objectives is to extend foreign language to the 4th grade, as studies show the earlier children are exposed to a foreign language the more proficient they will become. The best way for the 4th and 5th graders to learn a new language is through immersion methodology, which includes establishing a culturally rich classroom environment. This classroom would have objects and boards sporting the "realia" materials for each language and a library with foreign language-specific reading materials.

Presently, there is no space in the building for such a classroom. In the event Dalton is able to add additional floors to the building, this type of classroom may be located on one of these floors, which would greatly benefit our program. This classroom may also allow us to add new foreign languages, such as Hindi, Arabic, Russian and Brazilian Portuguese.

In an increasingly interconnected world, it is now more important than ever that our children be given the opportunity to learn a greater variety of foreign languages and begin their education at an earlier age, for which "immersion methodology" in a classroom such as the one described above is essential.

Sincerely,



Lori Langer de Ramirez

B.A. SUNY, The College at New Paltz - Spanish / Secondary Education

M.S. CUNY, Queens College - Applied Linguistics/TESOL

Ed.D. Teachers College, Columbia University - Curriculum and Teaching



June 5, 2013

Hon. Meenakshi Srinivasan, Chair
&
Members of the Board of Standards and Appeals
40 Rector Street - 9th Floor
New York, New York 10006

Dear Chair Srinivasan:

I have been a member of Dalton's faculty and served as chair of Dalton's Mathematics Department since September 2007.

The current trend in mathematics education is towards a greater emphasis on students working in groups rather than the traditional lecture format. The standard classroom arrangement, with standalone chairs and desks oriented towards a blackboard at the front of the room is considered obsolete as it is not suited towards classes which prioritize group work.

Unfortunately, due to Dalton's lack of space, we do not have a classroom that is designed for group work in line with the latest developments in mathematics teaching. Dalton needs a new mathematics classroom which would be interactive, with writeable walls and no front, in which the emphasis is not on an instructor lecturing in front of the room.

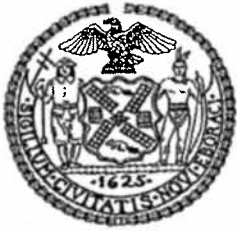
This room would be conducive for group work on problem sets in and outside of class. It would also support student-teacher math "Lab" meetings. With this classroom, we could expand the Math Team and hold its classes here. This room is also needed for two new classes we are preparing to offer which emphasize group work on problem sets rather than traditional lectures. Lastly, we need this room in order to offer a new Game Theory class for seniors.

It is vital that Dalton expand its building so that such a classroom can be created, which would greatly improve our mathematics program by allowing us to implement the latest innovations in math education, substantially enriching our students' learning experience.

Sincerely,

Lisa Borenstein

B.S. Mathematics MIT 1982
B.S. Management Science MIT 1982
M.S. Management Sloan School, MIT 1983
M.A. Math Education Hunter College 2002



BOARD OF STANDARDS AND APPEALS

40 Rector Street, 9th Floor
New York, New York 10006-1705
Phone: (212) 788-8500
www.nyc.gov/bsa

AFFIDAVIT OF OWNERSHIP AND AUTHORIZATION

Affidavit of Ownership

State of New York
County of New York
Edward Pinger

being duly sworn, deposes and says that (s)he resides
at 1049 Fifth Avenue, in the City of New York, in the County of New York, in the
State of New York; that Dalton Schools, Inc. is the owner in fee of all that certain
lot, piece or parcel of land located in the Borough of Manhattan, in the City of New York
and known and designated as Block 1517, Lot(s) 62, Street and House Number
108-114 East 89th Street; and that the statement of facts in the annexed application are true.

Check one of the following conditions:

- ☒ Sole property owner of zoning lot
☐ Cooperative Building
☐ Condominium Building
☐ Zoning lot contains more than one tax lot and property owner

Owner's Authorization

The owner identified above hereby authorizes Greenberg Traurig, LLP, by its shareholder Jay A. Segal, Esq.
to make the annexed application in her/his behalf.

Signature of Owner

E. B. Pinger

Print Name

Dalton Schools, Inc., by Edward Pinger

Print Title

Chief Administrative Officer

Sworn to before me this 7TH day

Of June 2 013

[Signature]

DIANE FERRANTE
Notary Public, State of New York
No. 01FE5055605
Qualified in Nassau County
Commission Expires February 12, 2014





NYC Development Hub
Department of Buildings
80 Centre Street
Third Floor
New York, New York 10013
nycdevelopmenthub@buildings.nyc.gov

Notice of Comments

| | |
|---|--|
| Owner: NED PINGER THE DALTON SCHOOL, INC | Date: June 12, 2013 Job Application #: 121234912 |
| Applicant: GWENDOLYN CONNERS 1100 ARCHITECT, PC | Application type: Alt-1 Premises Address: 108 East 89 th Street, Manhattan Zoning District: R8B |
| Block: 1517 Lot:62 Doc(s): 01 | |
| Lead Plan Examiner at NYC Development Hub: Maria-Teresa Fernandez | |
| Examiner's Signature: | |

| Obj. # | Doc # | Section of Code | Comments | Date Resolved | Comments |
|--------|-------|-----------------------------|--|---------------|----------|
| 1. | | ZR 24-522(b) & ZR 23-633 | Proposed base height exceeds 60'; contrary to ZR 24-522(b) & ZR 23-633. | | |
| 2. | | ZR 24-522(b) & ZR 23-633(b) | Proposed front setback is less than 15'; contrary to ZR 24-522(b) & ZR 23-633(b). | | |
| 3. | | ZR 24-522(b) & ZR 23-633(b) | Proposed building height exceeds 75'; contrary to ZR 24-522(b) & ZR 23-633. | | |
| 4. | | ZR 24-552(b) | Proposed rear setback above 60' is less than 10'; contrary to ZR 24-552(b). | | |
| 5. | | ZR 24-11 | Proposed FAR for zoning lot containing only community facility use exceeds 5.10 maximum for R8B District within Community Board 8, Manhattan | | |
| 6. | | ZR 24-51(f)(3) | Proposed mechanical equipment exceeds maximum allowed for permitted obstructions; contrary to ZR 24-51(f)(3)." | | |

| | |
|---|--|
| REVIEWED BY Jed Weiss Executive Zoning Specialist  DENIED For Appeal to Board of Standards and Appeals Date/Time: Jun 12, 2013 - 4:25 PM | REVIEWED BY Jed Weiss Executive Zoning Specialist  DENIED For Appeal to Board of Standards and Appeals Date/Time: Jul 9, 2013 - 6:06 PM |
|---|--|

Board History
Calendar No. 360-65-BZ

| Date | Cal. No. | Zoning | Board Action | Condition(s) |
|-----------|-----------|--------|--|---|
| 6/8/65 | 360-65-BZ | R8 | Application for a variance pursuant to ZR Section 72-21 and special permit pursuant to ZR Section 73-641 to permit erection of a one-story enlargement in violation of floor area ratio, front/rear setback and sky exposure plane regulations. GRANTED | <ul style="list-style-type: none"> the building shall conform to drawings received March 25, 1965 (17 sheets) and June 3, 1965 (3 sheets); compliance with all applicable laws, rules and regulations; and permit shall be obtained, work completed and a Certificate of Occupancy obtained within one year. |
| 3/3/92 | 360-65-BZ | R8B | Application to reopen and amend the prior resolution pursuant to Sections 72-01 and 73-11 of the Zoning Resolution to permit: the expansion of the 10th story library mezzanine (creating a new 11th story); the insertion of floor slab into the double height gymnasium (former 11th story) to convert the gymnasium into two new classroom floors; and the installation of windows, cornice, water tank enclosure and elevator penthouse, in violation of floor area ratio and height and setback regulations. GRANTED | <ul style="list-style-type: none"> constructed substantially as shown on drawings received on February 14, 1992 (25 sheets numbered Z1 thru Z25 and 22 sheets numbered E1 thru E22) the resolution cited above shall be complied with in all respects. a new Certificate of Occupancy obtained within two years. |
| 9/12/2000 | 360-65-BZ | R8B | Application to reopen and amend the prior resolution pursuant to Sections 72-01 and 73-11 of the Zoning Resolution to permit a 237.5 SF enlargement to rear of building. GRANTED | <ul style="list-style-type: none"> premises shall be maintained in substantial compliance with drawings received on May 9, 2000 (2 sheets); the resolution cited above shall be complied with in all respects. |



Certificate of Occupancy

CO Number: 110073063F

This certifies that the premises described herein conforms substantially to the approved plans and specifications and to the requirements of all applicable laws, rules and regulations for the uses and occupancies specified. No change of use or occupancy shall be made unless a new Certificate of Occupancy is issued. *This document or a copy shall be available for inspection at the building at all reasonable times.*

| | | | |
|--|--|-------------------------------|-----------------------------------|
| A. | Borough: Manhattan | Block Number: 01517 | Certificate Type: Final |
| | Address: 108 EAST 89TH STREET | Lot Number(s): 62 | Effective Date: 02/27/2009 |
| | Building Identification Number (BIN): 1048100 | Building Type: Altered | |
| <i>For zoning lot metes & bounds, please see BISWeb.</i> | | | |
| B. | Construction classification: 1 | (Prior to 1968 Code) | |
| | Building Occupancy Group classification: PUB | (Prior to 1968 Code) | |
| | Multiple Dwelling Law Classification: None | | |
| | No. of stories: 13 | Height in feet: 114 | No. of dwelling units: 0 |
| C. | Fire Protection Equipment: None associated with this filing. | | |
| D. | Type and number of open spaces: None associated with this filing. | | |
| E. | This Certificate is issued with the following legal limitations: Board of Standards and Appeals - Recording Info: 360-65BZ | | |
| Borough Comments: None | | | |

Borough Commissioner

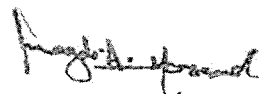
Commissioner

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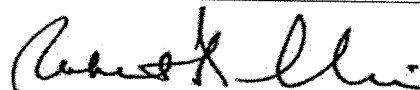
Certificate of Occupancy

CO Number: 110073063F

| Permissible Use and Occupancy | | | | | | |
|--|---------------------------|---------------------------|-------------------------------|---------------------------|------------------|--|
| All Building Code occupancy group designations are 1968 designations, except RES, COM, or PUB which are 1938 Building Code occupancy group designations. | | | | | | |
| Floor From To | Maximum persons permitted | Live load lbs per sq. ft. | Building Code occupancy group | Dwelling or Rooming Units | Zoning use group | Description of use |
| CEL | 150 | OG | PUB | | 3 | SHOPS, CLASSROOMS, MECHANICAL EQUIPMENT ROOM, STORAGE ROOM |
| SUB | 5 | OG | PUB | | 3 | BOILER ROOM, MECH. EQUIPMENT ROOMS |
| 001 | 530 | 100 | PUB | | 3 | AUD. OFFICES, BOOK STORE, CLASSROOMS, COSTUME ROOM |
| 002 | 150 | 100 | PUB | | 3 | BALCONY, STORAGE ROOM, BOARD ROOM OFFICES |
| 003 | 170 | 75 | F-4 | | 3 | CAFETERIA |
| 003 | 171 | 75 | F-1B | | 3 | MEETING ROOM (NON SIMULTANEOUS) |
| 003 003 7 | 75 | | PUB | | 3 | OFFICES |
| 003 003 44 | 75 | | PUB | | 3 | CLASSROOMS |
| 003 003 5 | 75 | | PUB | | 3 | KITCHEN |
| 004 | 135 | 100 | PUB | | 3 | CLASSROOMS, LABS, OFFICES, DARK ROOM, STORAGE |
| 005 005 120 | 100 | | PUB | | 3 | CLASSROOMS, OFFICE, PLAY ROOF |
| 006 006 120 | 75 | | PUB | | 3 | CLASSROOMS, STORAGE, PLAY ROOF |
| 007 007 120 | 75 | | PUB | | 3 | CLASSROOMS, OFFICES |



Borough Commissioner



Commissioner

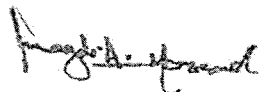
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Certificate of Occupancy

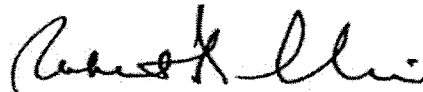
CO Number:

110073063F

| Permissible Use and Occupancy | | | | | | |
|--|---------------------------|---------------------------|-------------------------------|---------------------------|------------------|---|
| All Building Code occupancy group designations are 1968 designations, except RES, COM, or PUB which are 1938 Building Code occupancy group designations. | | | | | | |
| Floor From To | Maximum persons permitted | Live load lbs per sq. ft. | Building Code occupancy group | Dwelling or Rooming Units | Zoning use group | Description of use |
| 008 008 | 120 | 75 | PUB | | 3 | CLASSROOMS, ACTIVITIES ROOM |
| 009 009 | 120 | 75 | PUB | | 3 | CLASSROOMS, STORAGE |
| 010 010 | 120 | 160 | F-1B | | 3 | LIBRARY |
| 011 011 | 80 | 160 | F-1B | | 3 | LIBRARY |
| 012 012 | 170 | 160 | PUB | | 3 | CLASSROOMS. ACCESSORY DANCE STUDIO |
| 013 013 | 169 | 40 | PUB | | 3 | CLASSROOMS |
| ROF | 30 | 60 | PUB | | 3 | PLAY ROOF, ELEVATOR, MECH ROOM (ADDITIONAL LIVE LOAD 40) |
| END OF SECTION | | | | | | |



Borough Commissioner



Commissioner

END OF DOCUMENT

110073063/000 02/27/2009 03:57:56 PM



City of New York
Board of Standards and Appeals
40 Rector Street, 9th Floor
New York, NY 10006-1705

BSA Cal. No.: 360-65-BZ

Street Address: 108-114 East 89th Street

Block: 1517 Lot(s): 62

Borough: Manhattan

CERTIFICATION OF INSPECTION & COMPLIANCE

Jay A. Segal

_____ hereby states that I personally inspected the
(Applicant, Agent, Registered Architect or Registered Engineer)
premises and surrounding area on May 28, 2013. In addition, I have
(Date of most recent inspection)
researched all relevant BSA records related to the premises, including BSA-approved plans and resolutions.
Each non-compliance with the terms, conditions and/or plans of the effective prior BSA grant is explained in
detail below. The specific date or time frame on which compliance will be restored, where possible to
ascertain, is listed.


[Note: A request to eliminate any prior condition must be part of the relief sought in the application; such request should not be made on this form]

☒ I confirm that the premises is developed and operates in accordance with the currently effective BSA-approved plans and resolution, submitted with this application.

☐ The following deviation(s) from the currently effective BSA-approved plans and/or resolution exist on the site:

Area(s) of non-compliance

Date(s) to achieve compliance.



Applicant/Agent Signature
(Registered Architect/Engineer Seal as Appropriate)

NYC BUILDINGS

PLACE OF ASSEMBLY PERMIT

Department of Buildings

INITIAL PERMIT

PA Permit No. 104724880

Premises Address: 108 EAST 89 STREET

Borough: MANHATTAN

Issue Date: 09/12/2007

Block/Lot: 1517 / 62

Expiration Date: 09/12/2008

Related NB/A1 Job No: 104858129

Zoning District: R8B

Name of Establishment: THE DALTON SCHOOL

Permission is hereby granted to occupy premises as a place of assembly.

Floors: 3RD

Number of Persons: 171

Occupancy Classification(s) and Description(s):

F-4 CAFETERIA Not a cabaret

F-1B MEETING HALL

This permit is subject to the strict observance of the laws, rules and regulations enacted for the protection of the public, in so far as they are applicable to this place of assembly, and continue in force for the period specified, unless sooner suspended or revoked.

Borough Commissioner: Christopher M. Santilli Commissioner: 

PERMIT MUST BE POSTED CONSPICUOUSLY AT ALL TIMES

NYC **BUILDINGS**

PLACE OF ASSEMBLY CERTIFICATE OF OPERATION

INITIAL CERTIFICATE

Certificate No. 110229422

Premises Address: 108 EAST 89TH STREET

Borough: MANHATTAN

Issue Date: 03/03/2009

Block/Lot: 1517 / 62

Expiration Date: 03/03/2010

Related NB/A1 Job No: 110073063

Name of Establishment: THE DALTON SCHOOL LIBRARY

Permission is hereby granted to occupy premises as a place of assembly.

Floors:

010 t

Occupancy Classification and Description:

Number of Persons

A-3 MEETING HALL Not a cabaret

200

This certificate is subject to the strict observance of the laws, rules and regulations enacted for the protection of the public, in so far as they are applicable to this place of assembly, and continue in force for the period specified, unless sooner suspended or revoked.

Borough Commissioner:



Commissioner:



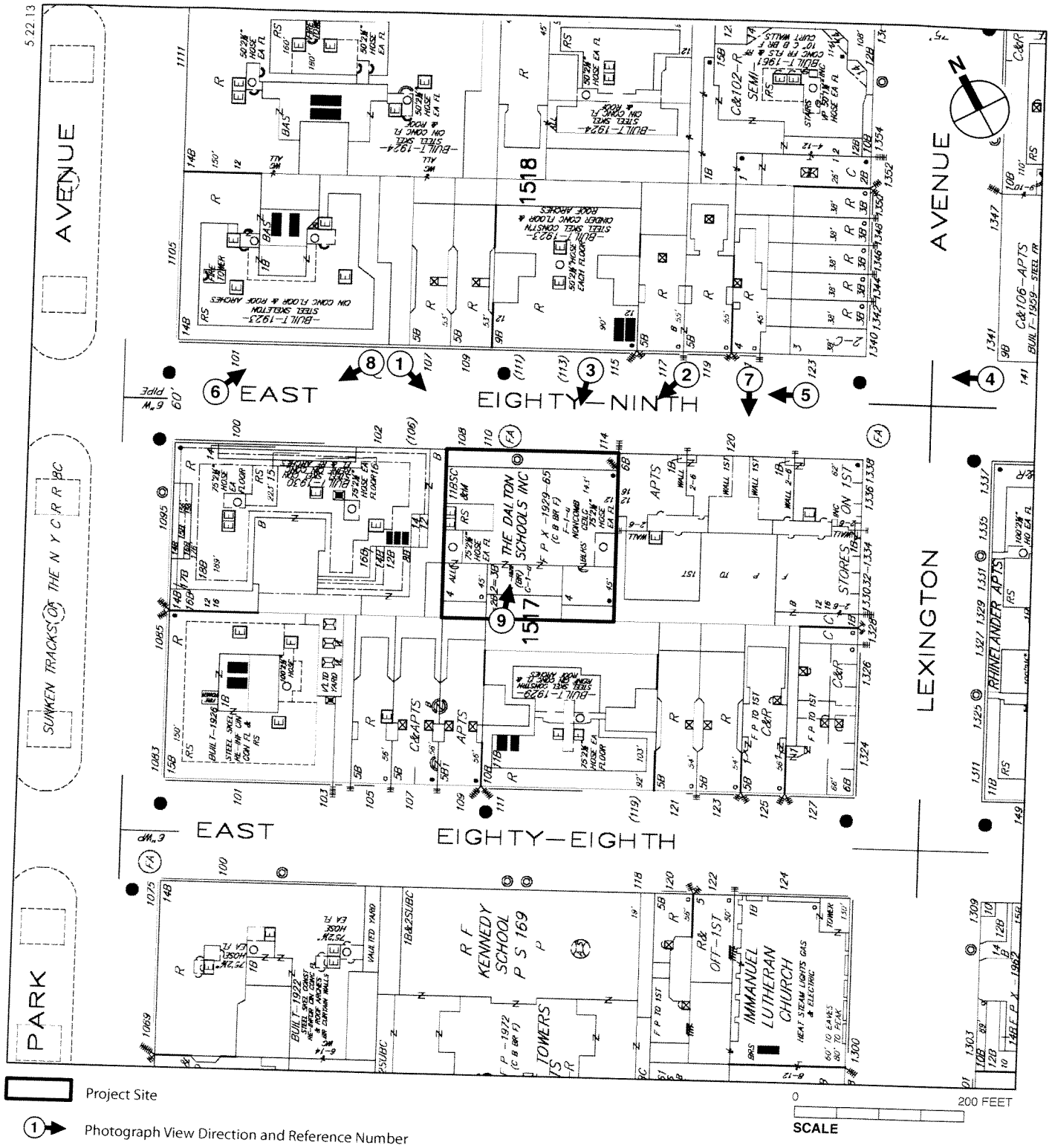
MUST BE POSTED CONSPICUOUSLY AT ALL TIMES

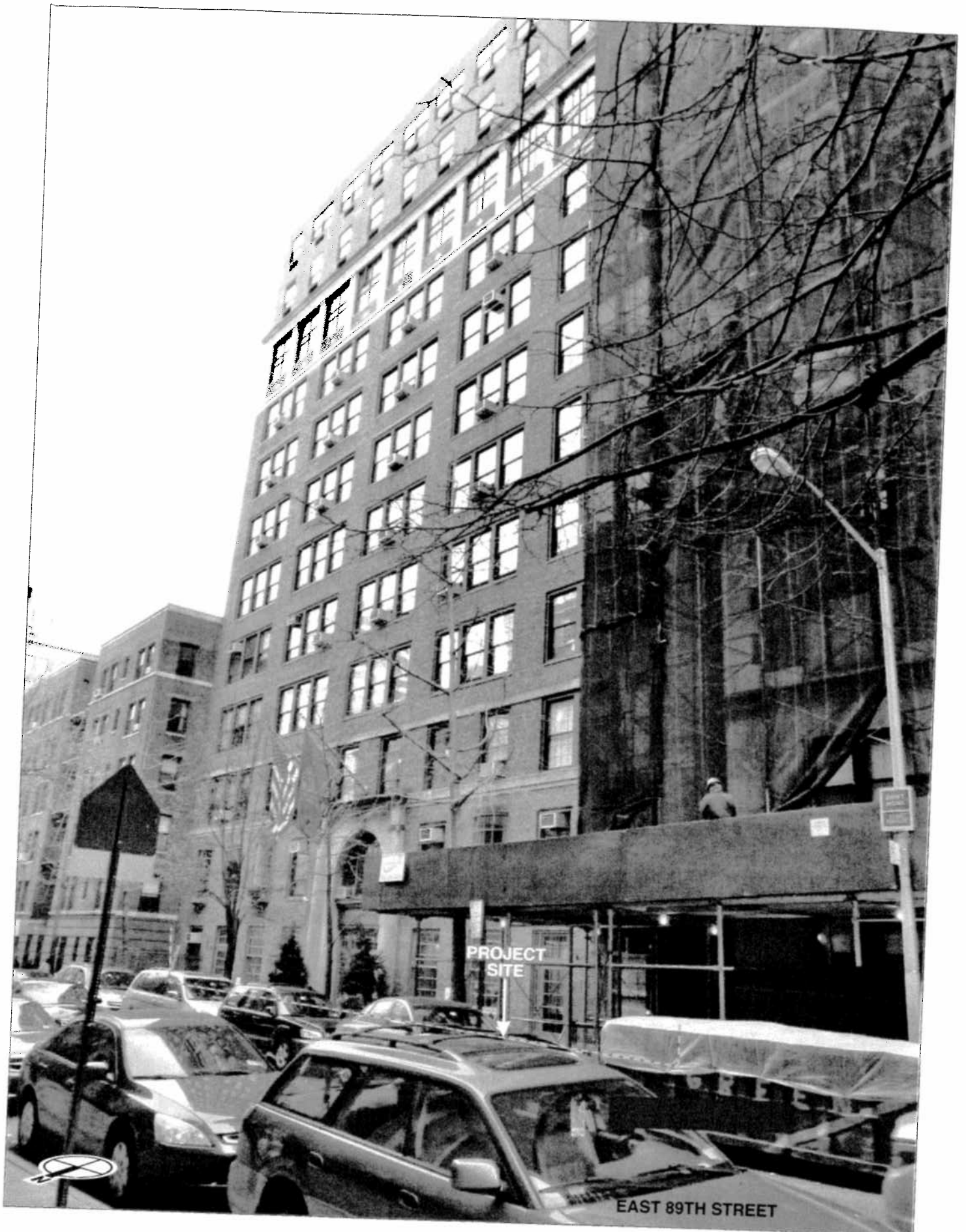
| | | | | | | |
|-------------------------------|--------------------------|------------------|-----------------|----------------------|-----------------|-----------------|
| BSA CALENDAR NO. | 360-65-BZ | | BLOCK 1517 | | LOT 62 | |
| SUBJECT SITE ADDRESS | 108-114 East 89th Street | | | | | |
| APPLICANT | Dalton Schools, Inc. | | | | | |
| ZONING DISTRICT | R8B | | | | | |
| SPECIAL/HISTORIC DISTRICT | N/A | | | | | |
| COMMUNITY BOARD | CB8 | | | | | |
| | PRIOR BSA # 360-65-BZ | | | | | |
| | COMPLIANT: "Y" | | | | | |
| | IF NOT: "N" and | | | | | |
| | INDICATE AMT | | | | | |
| | OVER/UNDER | | | | | |
| | * APPLICABLE | MAXIMUM | MINIMUM | LEGAL PER | | |
| | ZR SECTION | PERMITTED | REQUIRED | C of O or BSA | EXISTING | PROPOSED |
| LOT AREA | N/A | | - | - | 10,234.5 | 10,234.5 |
| LOT WIDTH | N/A | | - | - | 101.67' | 101.67' |
| USE GROUP (S) | 22-10 | 1-4 | | 3 | 3 | 3 |
| FA RESIDENTIAL | 23-145 | 40,938 | | - | 0 | 0 |
| FA COMMUNITY FACILITY | 24-11 | 52,196 | | - | 86,796.4 | 98,960.4 |
| FA COMMERCIAL/INDUST. | N/A | - | | - | 0 | 0 |
| FLOOR AREA TOTAL | | 52,196 | | | | 98,960.4 |
| FAR RESIDENTIAL | 23-145 | 4.0 | | - | 0 | 0 |
| FAR COMMUNITY FACILITY | 24-11 | 5.1 | | - | 8.48 | 9.67 |
| FAR COMMERCIAL/INDUST. | N/A | - | | - | 0 | 0 |
| FAR TOTAL | | 5.1 | | - | 8.48 | 9.67 |
| OPEN SPACE | N/A | | N/A | - | N/A | N/A |
| OPEN SPACE RATIO | N/A | | N/A | - | N/A | N/A |
| LOT COVERAGE (%) | 24-11 | 70% | | - | 78.6% | 78.6% |
| NO. DWELLING UNITS | 23-22 | 60 | | 0 | 0 | 0 |
| WALL HEIGHT | 23-633 | 60' | | - | 143'-10" | 170'-5" |
| TOTAL HEIGHT | 23-633 | 75' | | - | 143'-10" | 170'-5" |
| NUMBER OF STORIES | | | | 12 | 12 | 14 |
| FRONT YARD | 24-34 | | 0 | - | 10' | 10' |
| SIDE YARD | 24-35 | | 0 | - | 0' | 0' |
| SIDE YARD | 24-35 | | 0 | - | 0' | 0' |
| REAR YARD | 24-36 | | 30' | - | | |
| SETBACK (S) | 24-552(B) | | 10' | - | | |
| SKY EXP. PLANE (SLOPE) | N/A | N/A | | - | | |
| NO. PARKING SPACES | N/A | - | - | | | |
| LOADING BERTH (S) | N/A | - | - | | | |
| OTHER: | | | | | | |

* In Applicable ZR Section column: For RESIDENTIAL developments in non-residential districts, indicate nearest R district, e.g., R4/23-141, and contrast compliance. For COMMERCIAL or MANUFACTURING developments in residential districts, contrast proposed bulk and area elements to **current R district requirements**, except for parking and loading requirements (contrast to nearest district where use is permitted). For COMMUNITY FACILITY uses in districts where not permitted, contrast to **nearest district where permitted**. For all applications, attach zoning map and highlight subject site. Be sure that all items noted in the DOB Denial/Objection are included.

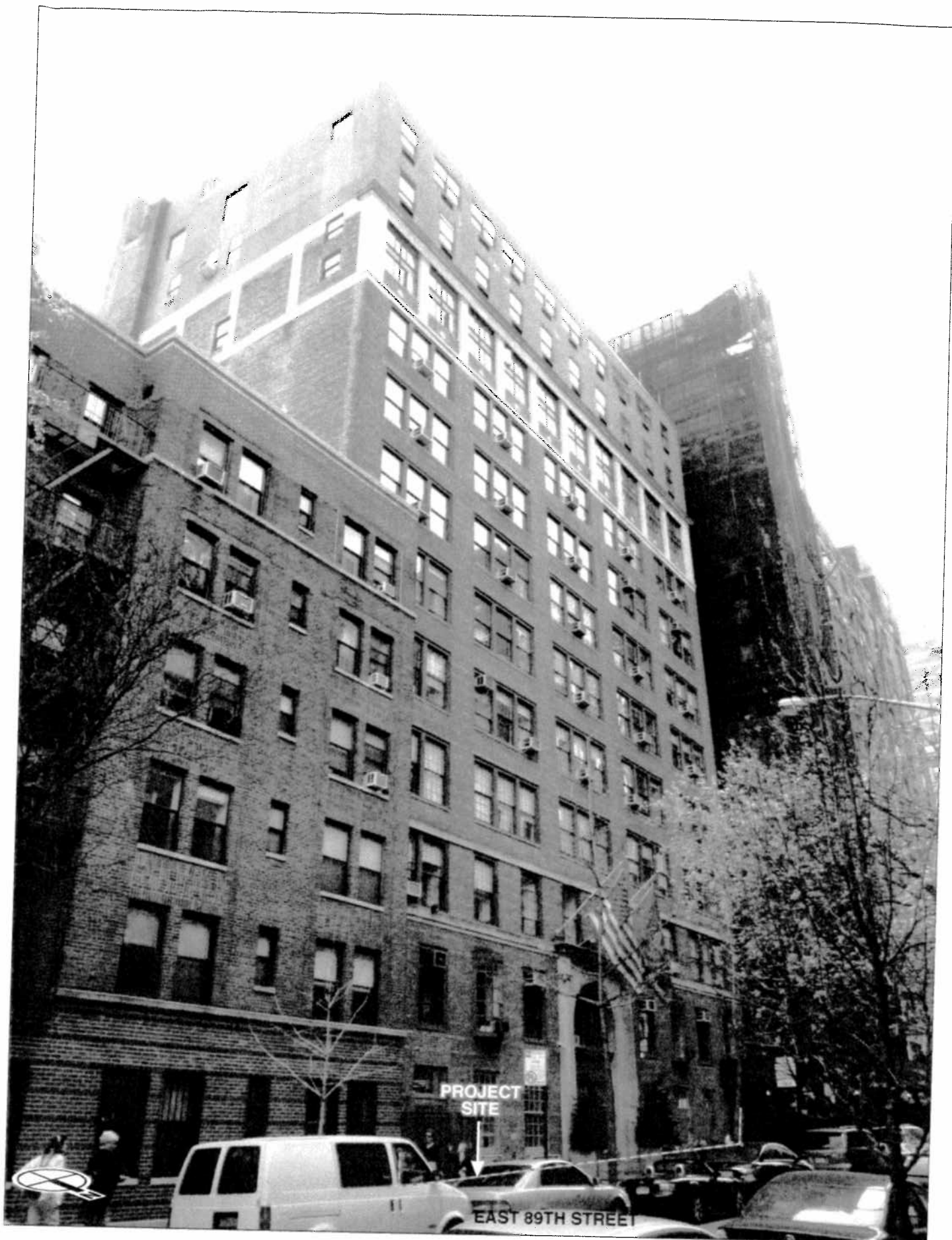
NOTES: * EXIST & PROPOSED REAR YARD = 0' Fls 1&2, 10.2' Fls 3-5, 30.7

Fls 6-14. ** 10' SETBACK FROM RY LINE REQ. 15' FRONT SETBACK REQ. PER 23-633(B); 0' FRONT SETBACK EXISTING/ PROPOSED.





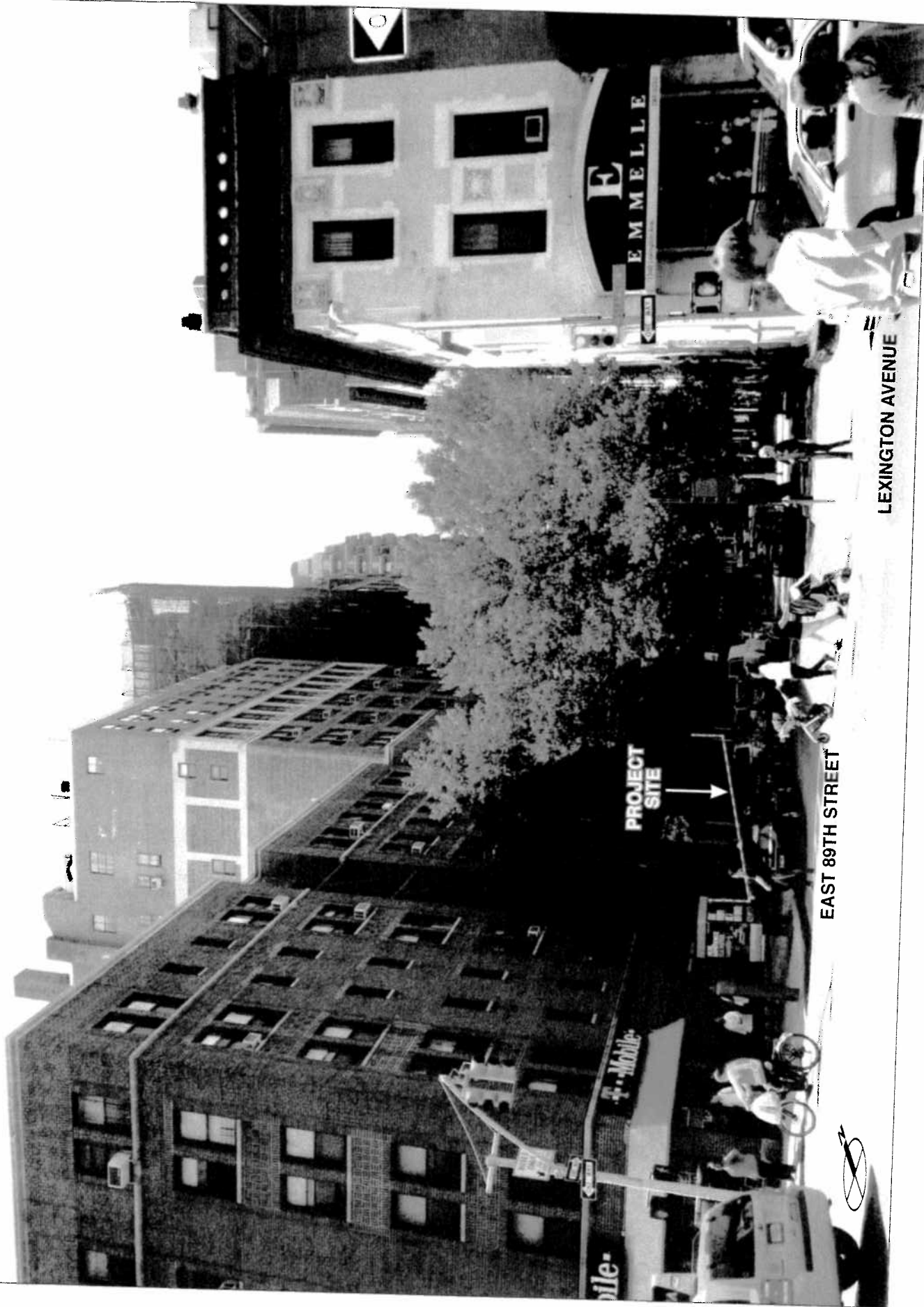
View of the Project Site from East 89th Street looking east



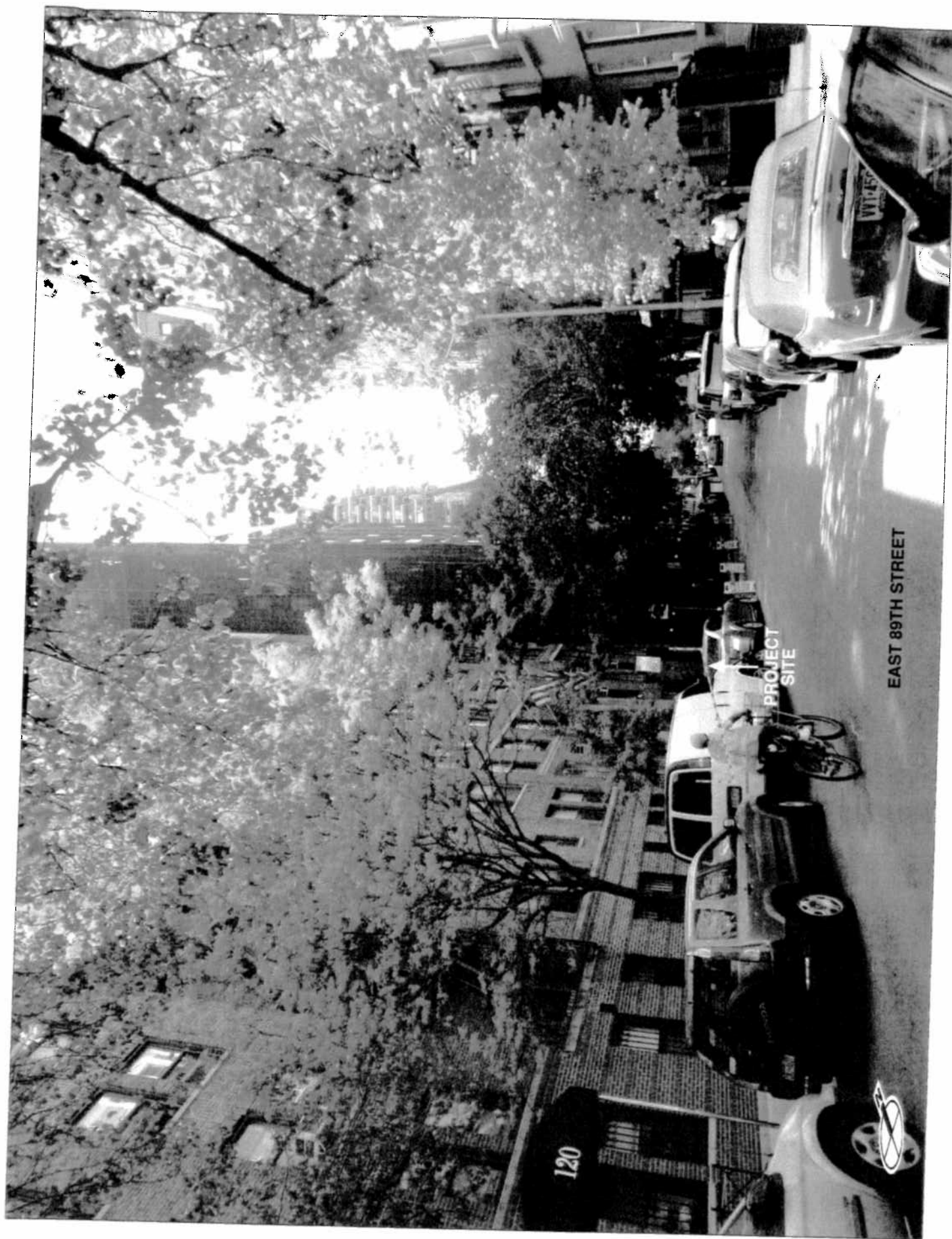
View of the Project Site from East 89th Street looking west



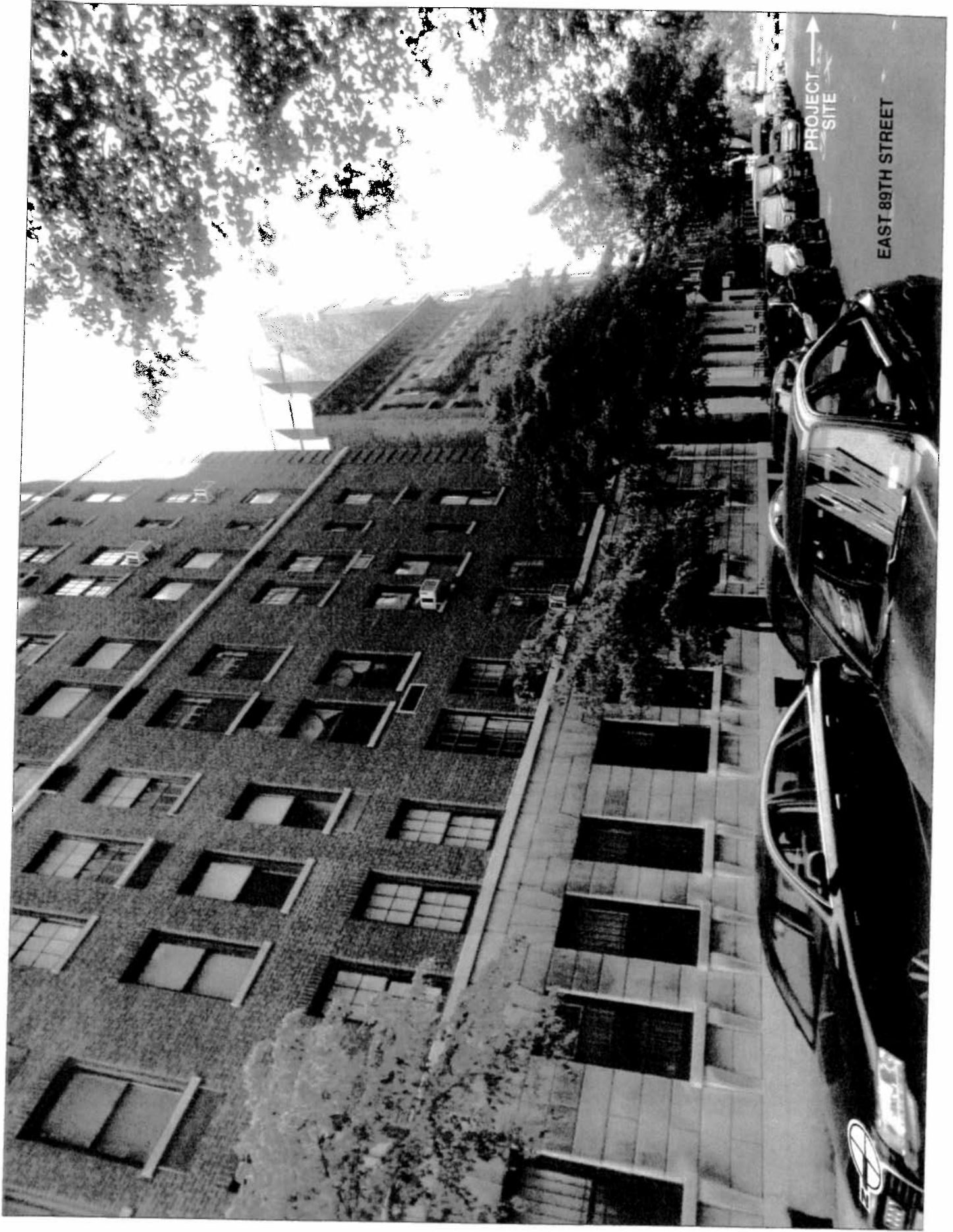
View of the Project Site from East 89th Street looking south



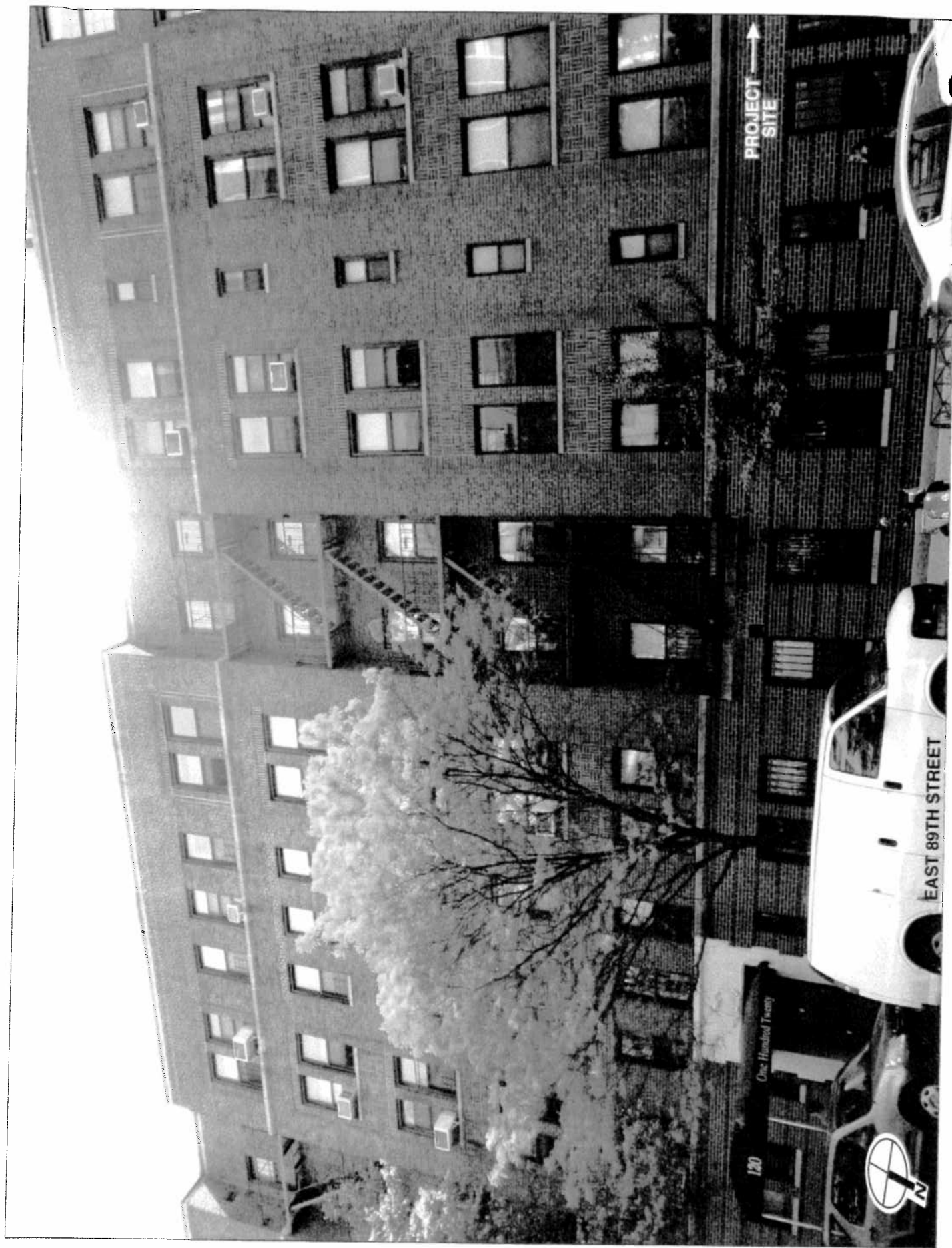
View looking west along East 89th Street from Lexington Avenue 4



View looking west along East 89th Street 5



View looking northeast along East 89th Street 6







View of southern facade of the existing building on the Project Site 9