



THE CITY OF NEW YORK  
**OFFICE OF THE PRESIDENT**  
BOROUGH OF MANHATTAN

**SCOTT M. STRINGER**  
BOROUGH PRESIDENT

**Statement by Manhattan Borough President Scott M. Stringer  
Before the Board of Standard and Appeals Hearings on  
Cal. No. 149-08-A – 808 Columbus Avenue  
December 16, 2008**

I would like to thank Chair Meenakshi Srinivasan and the Members of the Board of Standards and Appeals for hearing these appeals, and for the opportunity to submit testimony. As you know, the aforementioned appeals stem from the letters of objections I originally submitted to the Department of Buildings (“DOB”) on July 27, 2007 and February 7, 2008.

After initially upholding its determinations, DOB has since agreed with me that some of the original approvals for this development were improperly granted. Two issues remain in dispute before the Board today.

These are very important cases with wide-reaching policy implications for the way we regulate building form and preserve neighborhood character in New York City. At the heart of this case is whether or not this development should be allowed to proceed without undergoing required public and environmental review processes. I originally objected to these approvals being granted without such review, and I continue to feel that the approvals were improperly granted. Allow me to address some of the issues and arguments raised since my original objections were filed.

### **Open Space and Density**

The building permit issued for 808 Columbus Avenue included a reconsideration from DOB that allowed the owner to subdivide open space into four different open spaces for the individual buildings on the zoning lot. Open space for three existing buildings (784, 788 and 792 Columbus Avenue) is proposed to be located at ground level. Open space for 808 Columbus, the new building, is proposed to be located both at ground level and on top of existing commercial space. The open space would only be accessible to the residents of 808 Columbus Avenue. No such restrictions exist on any of the other open space. Indeed, the residents of the 808 Columbus Avenue building will be able to access all open space provided on the lot (both the rooftop and ground-level open space), and therefore enjoy privileged access to the lot’s required open space over all other residents (who will only be able to access the ground-level space).

The open space was required pursuant to Sections 23-14 and 23-142 of the Zoning Resolution (ZR §§ 23-14 and 23-142), which state that buildable floor area is only permitted if a certain minimum amount of open space is provided. The open space is listed as a percentage of the total

built floor area. In this case, the development is permitted a 3.42 floor area ratio, provided that the open space provided be equivalent to 22.5% of the total built floor area.

The appeal and my original letters contend that the roof top open space does not qualify as open space, as it is defined by the Zoning Resolution, because it is not accessible to all people living on the zoning lot.

#### *Letter of the Law*

Section 12-10 of the Zoning Resolution (“ZR §12-10”) states that unimproved grounds can qualify as “open space” if they meet several stipulations, including that they be “accessible and useable by all persons occupying a ‘dwelling unit’ ...on a zoning lot”. The plain meaning of ZR §12-10 is that the open space must be provided to all persons living on the zoning lot. This reading is supported by Directive #6 of 1968 (Directive) from the DOB which states that the section be:

“interpreted to mean that all open space shall be accessible and usable by all residents of the building or buildings. The definition of open space further specifies conditions under which the roof of a non-residential portion...may be used as open space. New developments must conform with all the provisions regarding open space.” (emphasis added).

DOB and the owner have contended that allowing the subdivision of open space is consistent with the Directive and ZR §12-10. In its submission, the DOB states that the Directive “allows the applicant to choose whether to allocate open space generated by each building to be accessible and usable by all residents of that building or by all residents of all the buildings.” This concept runs directly counter to a plain reading of both the Directive and ZR §12-10. For unimproved land to count as required open space, it must follow all provisions of the law, including that it be open to all persons residing on a zoning lot.

#### *Proposed Reading by DOB*

Despite the clear meaning of the law, the DOB and the owner argue that ZR §12-10 must be understood in context of Sections ZR §§ 23-14 and 23-142, which dictate how much open space must be provided. Under their proposed reading, open space can be reserved for the residents of one specific building, because the required open space can be provided to “any building” on the zoning lot.

This reading is backwards. It argues that the term “any building,” which appears in ZR §§ 23-14 and 23-142, should be understood to modify the meaning of “open space,” which is a defined term in the zoning text. In interpreting the law, DOB should consider defined terms as fixed points.

The term “any building” indicates that *any building built* must provide the required open space, which by definition must be open and accessible to all residents of the zoning lot.

In this specific case, that means that any and every building on the zoning lot (including 784, 788, 792, or 808 Columbus Avenue or any combination thereof), must provide open space equal to 22.5% of the total floor area of the built buildings in order to qualify for a 3.42 FAR; and that open space must be accessible and useable by all residents residing in the buildings on the zoning

lot (784, 788, 792 and the proposed 808 Columbus Avenue). The only practical means of providing the required open space, as defined by the Zoning Resolution, is to make common open space accessible by all residents.

Since the amount of floor area permitted is proportional to the amount of open space provided, allowing the roof top space to be counted as required open space essentially credits the developer with unearned floor area. Based on drawings submitted to the DOB, the amount of open space provided on the roof equals roughly 56,851 square feet<sup>1</sup>. If lot coverage were increased and the open space were decreased to discount the roof as open space, then the owner would be constructing at a height factor of 8, not 15 as approved by DOB. Under this scenario, the developer proposes to overbuild the zoning lot by 74,789.84 square feet, or roughly 24% of the new building.

Increasing the developer's proposed building by 24% without providing the appropriate open space is contrary to the requirements of zoning and was done in an arbitrary and capricious fashion by the DOB. It is contrary to zoning, and the appeal should be upheld.

### **Use Group Classification**

In its submission, DOB indicates that the "Whole Foods has been classified appropriately as Use Group 6" and that "[Whole Foods] has been properly classified as Use Group 6 in other locations of the city." DOB has not indicated any rationale behind these determinations.

The owner attempts to create a more specific argument around the range of services for classifying Whole Foods. The owner states that Whole Foods "will be devoted primarily to the sale of food and related items" and therefore should be classified as "food stores" under use Group 6(A).

Whole Foods does primarily serve food, although it also sells clothing, medicine, books, and household items, and includes eating and drinking establishments in its stores. While some of these services are common to Use Group 6 grocery stores, they are also common to large stores such as Costco. DOB previously classified Cost-Co as a Department Store, Use Group 10A, at 32-50 Vernon Boulevard in Queens.

Costco also is devoted primarily to the sale of food and related items, so it cannot be the case, as the owner argues, that every establishment devoted to the sale of food must be classified as Use Group 6(A). In the case of Costco, DOB appropriately drew a relevant distinction between a typical grocery store and a large, high-impact destination store. Costco provides a range of services beyond a typical store, has a large service area and is expected to produce a large amount of traffic. This rationale for classifying Costco as a department store is consistent with the definition of Use Group 10 pursuant to § 32-19 of the Zoning Resolution (ZR §32-19).

ZR §32-19 states that uses that fall under Use Group 10 classification are "large retail establishments that: 1) serve a wide area and...are appropriate in secondary, major or central

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<sup>1</sup> The total roof top area is estimated at 685.5 square feet by 100 square feet (68,550) including the proposed tower portion, which counts towards the zoning lot coverage. The developer's submission indicates total lot coverage of 67,422 square feet for the zoning lot. The diagram submitted by the DOB indicates that the existing buildings and proposed community facility building have a combined lot coverage of 55,723 square feet. The remaining lot coverage of the proposed building at 808 Columbus Avenue is therefore 11,699. As a result, the roof top open space, which does not include the tower portion of the building, is 56,851 square feet.

shopping areas; and 2) [are] not appropriate in local shopping or local service areas because of the generation of considerable pedestrian, automobile or truck traffic.” Traffic is clearly a valid metric, suggested in the zoning text, for distinguishing local Use Group 6 retail from Use Group 10 regional retail.

A similar determination should be made in the case of 808 Columbus as it relates to the proposed Whole Foods. The store’s size and variety of uses will generate traffic that is beyond what is found in a typical Use Group 6 grocery store.

While I do not take issue with Whole Foods Market as an individual store or as an appropriate retailer for the neighborhood, the store remains inappropriately classified as Use Group 6. It should be classified as a Use Group 10 regional store unless the scope of the store is reduced. Its size is not ordinarily permissible for a commercial overlay in a residential neighborhood, and should only be permitted after appropriate review.

### **Conclusion**

DOB’s interpretations go beyond the plain letter of the law and have created a development which exceeds the limits of the area’s zoning. If the developer cannot provide open space, as defined by the Zoning Resolution, then it cannot and should not be granted an additional 76,000 square feet of unearned floor area. DOB has effectively chosen not to follow the Zoning Resolution, but rather to submit its own judgment in place of the clear language of the law or the legislative intent. This is beyond the DOB’s authority.

Further, by classifying Whole Foods as a Use Group 6 grocery store, the DOB has ignored the intent of the law. Whole Foods will provide a variety of services and at a scope that will increase traffic beyond that of a typical grocery store. Therefore, an appropriate designation as Use Group 10 department store is warranted. This is consistent with the legislative guidance provided at the preamble to Zoning Resolution Use Group 10 as to which uses should receive Use Group 10 classification.

For all these reasons, I ask that the Board uphold the appeal.

Thank you for your consideration and for your attention to these important issues.

Scott M. Stringer  
Manhattan Borough President