

83-11-A

APPLICANT – Marvin B. Mitzner, Esq., for 159 West 78th Street, Corp., for Felix and Lisa Oberholzer-Gee, owners.

SUBJECT – Application June 9, 2011 – Appeal pursuant to §310 of the Multiple Dwelling Law (MDL) to allow for a one-story enlargement of a four-story building, contrary to Multiple Dwelling Law §171(2)(f). R8B zoning district.

PREMISES AFFECTED – 159 West 78th Street, north side of West 78th Street, between Columbus and Amsterdam Avenues, Block 1150, Lot 8, Borough of Manhattan.

COMMUNITY BOARD #7M

APPEARANCES –

For Applicant: Marvin B. Mitzner.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collin, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....5

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated May 10, 2011, acting on Department of Buildings Application No. 120553187 reads, in pertinent part:

Proposed enlargement of a converted dwelling exceeds 25% of the area at the 4th floor which is contrary to MDL 171-2(f) hence it is not permitted; and

WHEREAS, this is an application pursuant to Multiple Dwelling Law (“MDL”) § 310, to vary height and bulk requirements in order to allow for the proposed partial one-story vertical enlargement of the subject four-story and basement residential building from office use, contrary to MDL § 171(2)(f); and

WHEREAS, a public hearing was held on this application on June 5, 2012, after due notice by publication in *The City Record*, with a continued hearing on July 17, 2012, and then to decision on August 14, 2012; and

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

WHEREAS, Community Board 7, Manhattan, recommends approval of the proposed partial one-story enlargement, but objects to the design of the proposed replacement windows for the front of the fourth floor; and

WHEREAS, the subject site is located on the north side of West 78th Street, between Amsterdam Avenue and Columbus Avenue, in an R8B zoning district within the Upper West Side Historic District; and

WHEREAS, the site has 19 feet of frontage along West 78th Street, a depth of approximately 102 feet, and a total lot area of 1,941 sq. ft.; and

WHEREAS, the site is occupied by a four-story and basement non-fireproof residential building; and

WHEREAS, the applicant states that the existing building was constructed in approximately 1900 and is currently occupied by five residential units, with one unit on each floor; and

WHEREAS, the subject building has a floor area of approximately 5,597 sq. ft. (2.88 FAR) and a height of 58’-3”;

WHEREAS, the applicant proposes to enlarge the building by constructing a partial fifth floor containing an additional 646 sq. ft. of floor area; and

WHEREAS, the applicant states that the proposed fifth floor will be used in conjunction with the existing fourth floor unit and will therefore not increase the number of units within the subject building; and

WHEREAS, the applicant further states that the proposed enlargement will increase the floor area of the subject building from 5,597 sq. ft. (2.88 FAR) to 6,243 sq. ft. (3.22 FAR) (the maximum permitted floor area is 7,764 sq. ft. (4.0 FAR)), and will increase the height of the building from 58’3” to 67’-4” (the maximum permitted height is 75’-0”); and

WHEREAS, the applicant notes that the proposed fifth floor enlargement will be set back 16’-10” from the building’s front façade so as not to be visible from the street; and

WHEREAS, MDL § 171(2)(f) states that it is unlawful to “enlarge or extend any converted dwelling so as to exceed by more than twenty-five per centum the area which such dwelling had on any floor at the time of its conversion...”; and

WHEREAS, because the proposed 646 sq. ft. enlargement at the fifth floor exceeds 25 percent of the area on the fourth floor, the Department of Buildings (“DOB”) determined that it does not comply with the requirements of MDL § 171(2)(f); and

WHEREAS, pursuant to MDL § 310(2)(a), the Board has the authority to vary or modify certain provisions of the MDL for multiple dwellings that existed on July 1, 1948, provided that the Board determines that strict compliance with such provisions would cause practical difficulties or unnecessary hardships, and that the spirit and intent of the MDL are maintained, public health, safety and welfare are preserved, and substantial justice is done; and

WHEREAS, as noted above, the subject building was constructed in approximately 1900; therefore the building is subject to MDL § 310(2)(a); and

WHEREAS, specifically, MDL § 310(2)(a) empowers the Board to vary or modify provisions or requirements related to: (1) height and bulk; (2) required open spaces; (3) minimum dimensions of yards or courts; (4) means of egress; and (5) basements and cellars in tenements converted to dwellings; and

WHEREAS, the Board notes that MDL § 171(2)(f)

83-11-A

relates to height and bulk; therefore the Board has the power to vary or modify the subject provisions pursuant to MDL § 310(2)(a)(1); and

WHEREAS, the applicant represents that practical difficulty and unnecessary hardship would result from strict compliance with the MDL; and

WHEREAS, the applicant notes that MDL § 171(2)(f) permits the enlargement of a converted dwelling up to 25 percent of the floor area of any floor, as it existed at the time the dwelling was converted; however, since there was no fifth floor at the time of the building's conversion, it has a calculated floor area of zero; and

WHEREAS, the applicant states that since the fifth floor has a floor area of zero, MDL § 171(2)(f) effectively prevents any vertical enlargement of the subject building¹; and

WHEREAS, the applicant further states that the fourth floor cannot practicably be enlarged horizontally to make up for this deficit because it would require cantilevering over the third floor, which is cost-prohibitive, and would impermissibly diminish the light and air to the rear windows of the third floor unit; and

WHEREAS, the applicant notes that the fourth floor also has less floor area as compared to the basement, first, and second floors, which are benefitted by a 13-ft. extension in the rear of the building, and as a result a horizontal enlargement of the fourth floor that complies with MDL § 171(2)(f) would be substandard in size (a complying enlargement of the fourth floor would be limited to approximately 234 sq. ft.); and

WHEREAS, the applicant represents that because a vertical enlargement is not permitted and a horizontal enlargement is impracticable, the MDL restriction creates practical difficulty and unnecessary hardship in that it prevents the site from utilizing the development potential afforded by the subject zoning district; and

WHEREAS, specifically, the applicant notes that the subject district permits an FAR of 4.0, and the proposed enlargement would increase the FAR of the building from 2.88 to 3.22; and

WHEREAS, the applicant represents that practical difficulties also arise regarding the use and enjoyment of the existing roof space; and

WHEREAS, specifically, the applicant states that although there is currently no habitable structure on the roof there is a usable deck on a portion of the roof, and the abutting properties to the east and west of the subject building both contain rooftop penthouses with large walls extending beyond the penthouse structures, thereby creating a canyon effect on the subject site's roof; and

WHEREAS, the applicant represents that the surrounding conditions cast the subject building's roof deck in shadow and diminish its usefulness; and

WHEREAS, based on the above, the Board agrees

that the applicant has established a sufficient level of practical difficulty and unnecessary hardship in complying with the requirements of the MDL; and

WHEREAS, the applicant states that the requested variance of MDL § 171(2)(f) is consistent with the spirit and intent of the MDL, and will preserve public health, safety and welfare, and substantial justice; and

WHEREAS, specifically, the applicant states that the proposal includes numerous fire safety improvements to mitigate the existing fire infirmities inherent in the pre-1929 building; and

WHEREAS, the applicant notes that MDL § 2 ("Legislative Finding") provides that the intent of the law is to protect against dangers such as "overcrowding of multiple dwelling rooms, inadequate provision for light and air, and insufficient protection against the defective provision for escape from fire..."; and

WHEREAS, accordingly, the applicant represents that the proposed construction promotes the intent of the law because: (1) it will not increase the number of residents in the building because the proposed fifth floor will be used in conjunction with the existing fourth floor unit, and therefore will not result in overcrowding within the building; (2) it will be modest in size and set back from the front and rear facades, thereby providing sufficient light and air to the proposed fifth floor without diminishing access to light and air for other units in the building; and (3) it will provide a number of significant fire safety improvements; and

WHEREAS, specifically, the applicant proposes to provide the following fire safety improvements: (1) the addition of sprinklers to both the existing fourth floor and the proposed fifth floor, and all common areas of the building will be fully sprinklered and upgraded as necessary; (2) new, non-combustible gypsum cement board cladding will be installed on all stair treads, risers, and exposed stringers; (3) porcelain tile flooring will be installed at hallways, in addition to porcelain tile matching stair treads and risers at all stairs; (4) all existing wood stair rails will be replaced with metal; (5) a new layer of fire resistant gypsum board will be installed to the underside of the existing staircases and landings; and (6) all doors leading to the apartments and cellar will have improved fireproof self-closing doors; and

WHEREAS, the applicant represents that the proposed fire safety measures will result in a substantial increase to the public health, safety, and welfare, which far outweighs any impact from the proposed enlargement; and

WHEREAS, by letter dated July 16, 2012, the Fire Department states that it reviewed the proposed plans as to emergency egress routes and Fire Department emergency access to the building, and has no objection to the proposal; and

WHEREAS, based on the above, the Board finds

¹ The vertical enlargement is also specifically prohibited pursuant to MDL §171(2)(a).

83-11-A

that the proposed variance to the height and bulk requirements of MDL § 171(2)(f) will maintain the spirit and intent of the MDL, preserve public health, safety and welfare, and ensure that substantial justice is done; and

WHEREAS, the applicant represents that the proposal will not affect the historical integrity of the subject property; and

WHEREAS, the applicant submitted a Certificate of Appropriateness from the Landmarks Preservation Commission ("LPC") approving work associated with the proposed enlargement, dated June 20, 2012; and

WHEREAS, accordingly, the Board finds that the Appellant has submitted adequate evidence in support of the findings required to be made under MDL § 310(2)(a) and that the requested variance of the height and bulk requirements of MDL § 171(2)(f) is appropriate, with certain conditions set forth below.

Therefore it is Resolved, that the decision of the Manhattan Borough Commissioner, dated May 10, 2011, is modified and that this appeal is granted, limited to the decision noted above, on condition that construction shall substantially conform to the plans filed with the application marked, "Received January 11, 2012" - five (5) sheets and "July 3, 2012" - one (1) sheet; and on further condition:

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed Department of Buildings objections related to the MDL;

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.

Adopted by the Board of Standards and Appeals, August 14, 2012.

**A true copy of resolution adopted by the Board of Standards and Appeals, August 14, 2012.
Printed in Bulletin No. 34, Vol. 97.**

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