

**85-11-A**

APPLICANT – Marvin B. Mitzner, Esq., for 327-335 East 9<sup>th</sup> Realty, LLC, owner.

SUBJECT – Application June 10, 2011 – Appeals pursuant to §310 of the Multiple Dwelling Law (MDL) to allow for enlargement to a five-story building, contrary to MDL §§ 51, 143, 146, 148 and 149. R8B zoning district.

PREMISES AFFECTED – 335 East 9<sup>th</sup> Street, between 1<sup>st</sup> and 2<sup>nd</sup> Avenue, Block 451, Lot 44, Borough of Manhattan.

**COMMUNITY BOARD #3M**

APPEARANCES –

For Applicant: Marvin B. Mitzner.

**ACTION OF THE BOARD** – Application granted on condition.

**THE VOTE TO GRANT** –

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

Negative:.....0

**THE RESOLUTION** –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated May 18, 2011, acting on Department of Buildings Application No. 120615209 reads, in pertinent part:

- 1) Every building erected after 04/08/29, exceeding 6 stories or 60 ft in height shall be equipped with an elevator as required by MDL Sect. 51.6, art 3... [MDL § 51.6]
- 2) All doors, stairs, hallways must be fire proof constructed. Two hours minimum required. [MDL §§ 148.3, 149.2]
- 3) 1<sup>st</sup> floor above cellar must be fire proof. [MDL § 143]
- 4) Hall & stairs must be separated with fire rated separations. [MDL §146]; and

WHEREAS, this is an application pursuant to Multiple Dwelling Law (“MDL”) § 310, to vary the noted sections of the MDL in order to allow for the proposed one-story vertical enlargement of the subject five-story residential building, contrary to MDL §§ 51(6), 148(3), 149(2), 143, and 146; and

WHEREAS, three companion applications to vary the MDL to permit one-story vertical enlargements of the three adjacent buildings, filed under BSA Cal. Nos. 80-11-A, 84-11-A and 103-11-A, were heard concurrently and decided on the same date; and

WHEREAS, a public hearing was held on this application on June 5, 2012, after due notice by publication in *The City Record*, with continued hearings on July 17, 2012 and August 14, 2012, and then to decision on September 11, 2012; and

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

Brown; and

WHEREAS, Community Board 3, Manhattan, recommends disapproval of this application; and

WHEREAS, New York City Council Member Rosie Mendez recommends disapproval of this application; and

WHEREAS, New York State Senator Tom Duane and New York State Assembly Member Brian Kananagh provided testimony in opposition to this application; and

WHEREAS, representatives for the East Village Community Coalition and the Greenwich Village Society for Historic Preservation provided testimony in opposition to this application; and

WHEREAS, collectively, the parties who provided testimony in opposition to this application are known as the “Opposition;” and

WHEREAS, the Opposition raised the following primary concerns: (1) the proposed building does not comply with zoning, specifically with regard to ZR § 23-692 (the “Sliver Rule”) and ZR § 23-621 (because the dormers exceed the permitted dimensions and therefore do not qualify as permitted obstructions); (2) the proposed building does not comply with other provisions of the MDL, particularly with regard to light and air; (3) the proposed enlargement does not comport with the low-rise character of the surrounding neighborhood; (4) the hardships cited by the applicant in complying with the MDL result from their decision to enlarge the building and are therefore self-created; (5) the proposal would set a precedent for other buildings to add additional stories contrary to MDL requirements; and (6) the Board should not allow the applicant to substitute their alternative fire safety measures for those required by the MDL; and

WHEREAS, the subject site is located on the north side of East 9th Street, between First Avenue and Second Avenue, within an R8B zoning district; and

WHEREAS, the site has 25 feet of frontage along East 9<sup>th</sup> Street, a depth of 92.25 feet, and a total lot area of 2,306 sq. ft.; and

WHEREAS, the site is occupied by a five-story non-fireproof building, with retail space on the ground floor and a total of eight dwelling units on the upper four floors (two dwelling units per floor); and

WHEREAS, the applicant states that the subject building is located on a single zoning lot with three adjacent buildings located at 329 East 9<sup>th</sup> Street (the “329 Building”), 331 East 9<sup>th</sup> Street (the “331 Building”), and 333 East 9<sup>th</sup> Street (the “333 Building”), each of which is seeking identical relief to vary the MDL in order to allow for a one-story vertical enlargement; and

WHEREAS, the applicant notes that the subject zoning lot has a total lot area of 8,395 sq. ft.; and

WHEREAS, the applicant states that the existing building was constructed prior to 1929; and

WHEREAS, the subject building has a floor area of approximately 7,023.5 sq. ft. and a height of 54’-3”; and

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WHEREAS, the applicant proposes to enlarge the building by constructing a sixth floor containing an additional 1,164.3 sq. ft. of floor area to be occupied by one additional dwelling unit, increasing the total number of dwelling units in the building to nine; and

WHEREAS, the applicant states that the proposed enlargement will increase the floor area of the subject building from 7,023.5 sq. ft. to 8,187.8 sq. ft., and in combination with the proposed enlargements of the 329 Building, the 331 Building, and the 333 Building, will increase the total floor area on the proposed zoning lot from 27,826 sq. ft. (3.31 FAR) to 31,510 sq. ft. (3.75 FAR) (the maximum permitted floor area is 33,580 sq. ft. (4.0 FAR)) and will increase the height of the subject building from 54'-3" to 67'-3" (the maximum permitted height is 75'-0"); and

WHEREAS, MDL § 211 requires that in order for a pre-1929 non-fireproof residential building to increase in height beyond five stories, the building must comply with the provisions of the MDL; the proposed addition of a sixth floor to the subject building results in the subject MDL non-compliances, as detailed below; and

WHEREAS, MDL § 51(6) requires that buildings exceeding six stories or 60'-0" in height must provide an elevator; and

WHEREAS, MDL § 148(3) requires that all stairs must be completely separated from all other stairs, public halls and shafts by fireproof walls, with fireproof doors and assemblies; and

WHEREAS, MDL § 149(2) requires that all public halls be completely enclosed with fireproof floor, ceiling and walls, and separated from all stairs by fireproof partitions or walls; and

WHEREAS, MDL § 143 requires that the first floor of the building be fireproof; and

WHEREAS, MDL § 146 requires that the public halls and stairs which serve as a means of egress from the apartments be separated by a fireproof wall; and

WHEREAS, because the proposed addition of the sixth floor exceeds 60'-0" in height, and the building is constructed of non-fireproof material, the Department of Buildings ("DOB") determined that it does not comply with the requirements of MDL §§ 51(6), 148(3), 149(2), 143, and 146; 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 prior to 1929; 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 each of the noted conditions fits within one of the sections of MDL § 310(2)(a) – namely height and bulk and means of egress – which the Board has the express authority to vary; therefore the Board has the power to vary or modify the subject provisions pursuant to MDL § 310(2)(a); and

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

WHEREAS, the applicant states that the requirement for an elevator under MDL § 51(6) would necessitate the creation of an entirely new elevator core only because the proposed addition is 7'-3" taller than the 60'-0" trigger for this requirement, even though it does not exceed six stories; and

WHEREAS, the applicant represents that, aside from the significant expense involved in such an undertaking, creating an elevator core would require significant physical alteration to the occupied dwelling units in the subject building, reducing the size of at least one of the two units on each floor; and

WHEREAS, the applicant further represents that, since the residential units in the building run parallel to each other, from the front to the back of the building, they are already narrow, and the placement of an elevator into the building would effectively cut at least one residential unit into two segregated portions; and

WHEREAS, the applicant represents that the requirement for fireproofing of the doors, stairs, and hallways under MDL §§ 148(3) and 149(2) is impossible to satisfy without the removal and replacement of the building's core structure, since the building is a wood frame structure; and

WHEREAS, the applicant further represents that such work cannot be performed since the building is currently occupied, and further, even if the building were empty such work would be so extensive that it would be akin to constructing a new building; and

WHEREAS, the applicant states that, similarly, the requirement for the first floor above the cellar to be fireproof under MDL § 143 is impossible to satisfy without removing the entire structure since the first floor and cellar ceiling are composed of wood; and

WHEREAS, finally, the applicant states that the requirement for a separation between the halls and stairs under MDL § 146 would necessitate either enclosing the staircases with fire-rated material or creating fire-rated vestibules between the apartments and the stairway; and

WHEREAS, the applicant represents that the logistics of the subject building are such that enclosing

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the staircases or creating fire-rated vestibules is impossible without encroaching into the occupied residential units; and

WHEREAS, the applicant states that while it has specified the practical difficulties that would result from strictly complying with each of the individual provisions of the MDL, the underlying issue is that the subject building was constructed over a century ago using the then common materials and designs, and there is no feasible way to remove all the combustible wood to create segregated and fireproof areas and add elevator cores; and

WHEREAS, the applicant also submitted a cost analysis from a real estate appraiser estimating that the cost of the fully-MDL compliant scenario for the subject building in combination with the 329 Building, the 331 Building, and the 333 Building is \$4,917,089, which is more than three times the cost of the proposed construction scenario for the four buildings of \$1,524,916; and

WHEREAS, the applicant notes that the cost analysis represents only the increased construction costs between the scenarios, and that the MDL-compliant scenario would also create significant loss of rental space and effectively destroy the viability of almost half of the existing apartments; and

WHEREAS, the applicant represents that because the proposed vertical enlargement is not permitted, 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, in combination with the proposed enlargements of the 329 Building, the 331 Building, and the 333 Building, will increase the FAR on the proposed zoning lot from 3.31 to 3.75; 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 §§ 51(6), 148(3), 149(2), 143, and 146 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, the applicant states that the objections

cited by DOB are all existing conditions in legally occupied buildings, and the proposal to increase the height from 54’-3” to 67’-3” to accommodate one additional residential unit effectively triggers the retrofitting of the entire building; and

WHEREAS, the applicant represents that the proposed construction promotes the intent of the law because the additional occupancies will be of minimal impact and will not result in overcrowding of the building, the newly constructed spaces will be compliant with current fire safety norms, and the proposal will provide a number of significant fire safety improvements; and

WHEREAS, specifically, the applicant proposes to provide the following fire safety improvements: (1) the installation of a non-combustible concrete floor in the first floor public hallway, (2) the installation of new fireproof stairs in the cellar/basement spaces; (3) the cladding of all remaining stairs with gypsum board underneath and fire retardant materials on the risers and treads; (4) the addition of two layers of 5/8-inch gypsum board to the ceilings of the common areas at each floor; (5) the addition of two layers of 5/8-inch gypsum board to the walls in the halls and stairwells; (6) the installation of fire proof self-closing doors for the entrance to each dwelling unit; (7) the addition of fire sprinklers throughout the building; (8) the installation of hard-wired smoke detectors in all residential units; and (9) the installation of new fire escapes at the rear of the subject building and the 333 Building, to complement the existing fire escapes on the buildings; and

WHEREAS, the applicant represents that the above-mentioned fire safety improvements provide a significant added level of fire protection beyond what presently exists in the subject building and improves the health, welfare, and safety of the building’s occupants; and

WHEREAS, specifically, the applicant states that (1) adding concrete and sheetrock are classic mechanisms to retard fire spread, even though they are not technically deemed fire proof due to the underlying wood structure, (2) replacing the cellar level stairs with fireproof stairs will provide increased fire safety, particularly to first responders, (3) encasing the upper level stairs in fire-retardant materials and adding gypsum board to the public hall ceilings will also add a significant measure of fire safety, and (4) adding sprinklers to the common areas, which are the areas for which the subject MDL provisions are intended to increase fire protection, will decrease the likelihood of fire spread and smoke propagation more efficiently than the creation of segregated halls and stairwells; and

WHEREAS, the applicant represents that the addition of one floor to the subject building does little to increase fire risk, and that the proposed building will

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actually be significantly safer than it is in its present condition; and

WHEREAS, the applicant submitted a report from a fire consultant endorsing the proposed improvements to the building and stating that “it cannot be understated how significantly fire safety will be improved if the plans are approved by the Board;” and

WHEREAS, the applicant represents that while the MDL is focused primarily on tenant safety from fire protection and security standpoints, the requirement for an elevator appears to be a provision related primarily to tenant convenience, and is properly classified as an amenity; and

WHEREAS, the applicant further represents that the 7’-3” of additional stairs that the sixth floor tenants would be required to climb beyond the 60’-0” height that triggers the elevator requirement does not create a hazard, and does not outweigh the extreme cost of creating elevator cores which would decrease the size of the dwelling units of tenants who currently live without the use of an elevator and would sever half of the dwelling units into disconnected parts; 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 between the four buildings on the proposed zoning lot, and has no objection to the proposal; and

WHEREAS, based on the above, the Board finds that the proposed variance to the requirements of MDL §§ 51(6), 148(3), 149(2), 143 and 146 will maintain the spirit and intent of the MDL, preserve public health, safety and welfare, and ensure that substantial justice is done; and

WHEREAS, as to the Opposition’s contention that the proposal does not comply with zoning, the Board requested that DOB review the proposed plans for zoning compliance, specifically in regards to the Sliver Rule and whether the dormers qualified as permitted obstructions under ZR § 23-621; and

WHEREAS, by letter dated August 14, 2012, DOB states that if the 331 Building, the 333 Building, and the 335 Building are on the same zoning lot, then they may be considered a single building per ZR § 23-692 and the applications would not be subject to the Sliver Rule’s height restriction because the combined abutting street walls above 60 feet are wider than 45 feet; further, DOB states that the 329 Building has a proposed height of 60 feet, which complies with the Sliver Rule; and

WHEREAS, in response, the applicant submitted additional evidence that all four buildings are on a single zoning lot, and states that therefore the buildings comply with the Sliver Rule per DOB’s letter; and

WHEREAS, as to the dormer issue, the DOB letter states that the dormers proposed in the applications are approximately seven feet above the maximum base height of 60 feet, therefore the width of the dormers must be reduced to 53 percent of the width of the street wall of each building; further, DOB states that the triangular portions of the dormers proposed within the required setback for the 331 Building, the 333 Building, and the 335 Building need to be removed in order to comply with ZR § 23-621(c)(1); and

WHEREAS, in response, the applicant submitted revised plans reflecting that the dormer for the 331 Building has been removed and the width of the dormers for the subject building and the 333 Building have been enlarged, which the applicant states makes the dormer widths consistent with DOB’s interpretation; and

WHEREAS, however, the applicant asserts that DOB has previously approved the creation of a dormer sidewall that is less than 65 degrees, and therefore argues that the sidewalls of the proposed dormers are not to be included in the aggregate width of the street walls of the dormers; and

WHEREAS, therefore, the applicant contends that the proposal is in full compliance with the Zoning Resolution, and states that any remaining issues regarding zoning compliance will be addressed with DOB prior to the issuance of a permit; and

WHEREAS, the Board does not take a position as to any zoning compliance, and if DOB maintains that there is any such non-compliance, it has not been waived by this decision or acceptance of the plans associated with the MDL conditions; and

WHEREAS, as to the Opposition’s contention that the building does not comply with other provisions of the MDL, the Board similarly does not take a position as to compliance with provisions of the MDL that are not the subject of the instant application, and if DOB maintains that there is any such non-compliance, it has not been waived by this decision or acceptance of the plans; and

WHEREAS, as to the Opposition’s arguments that the proposed enlargement will have a negative effect on the low-rise character of the surrounding neighborhood and that the alleged hardships are self-created by the applicant’s desire to enlarge the building, the Board notes that in an application to vary the requirements of the MDL under MDL § 310, unlike in an application to vary the Zoning Resolution under ZR § 72-21, the Board’s review is limited to whether there are practical difficulties and unnecessary hardship in complying with the strict letter of the MDL, that the spirit and intent of the MDL are maintained, and that substantial justice is done; and

WHEREAS, however, at the Board’s direction, the applicant revised its plans during the course of the hearing process to preserve the distinctive cornice on

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the front facade of the buildings (which was originally proposed to be altered) in an effort to make the proposed buildings consistent with the character of the surrounding neighborhood; 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 requirements of MDL §§ 51(6), 148(3), 149(2), 143 and 146 is appropriate, with certain conditions set forth below.

*Therefore it is Resolved*, that the decision of the Manhattan Borough Commissioner, dated May 18, 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 July 31, 2012"- (8) sheets, "August 28, 2012"- (4) sheets and "September 10, 2012"- (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 Department of Buildings will confirm the establishment of the zoning lot, consisting of tax lots 44, 45, 46, and 47, prior to the issuance of a building permit;

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, September 11, 2012.

**A true copy of resolution adopted by the Board of Standards and Appeals, September 11, 2012.  
Printed in Bulletin Nos. 36-38, Vol. 97.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**