217-09-A
APPLICANT – Marvin B. Mitzner, Esq., for 514-516 East 6th Street, owner.
SUBJECT – Application July 7, 2009 – An appeal seeking to vary the applicable provisions under the Multiple Dwelling Law as it applies to the enlargement of non- fireproof tenement buildings. R7-2 zoning district.
PREMISES AFFECTED – 514-516 East 6th Street, south side of East 6th Street, between Avenue A and B, Block 401, Lots 17 and 18, Borough of Manhattan.
COMMUNITY BOARD #3M
APPEARANCES –
For Applicant: Ian Rasmussen.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson…….4
Negative: Commissioner Montanez.....1
THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated July 6, 2009, acting on Department of Buildings Application No. 104744877 reads, in pertinent part:

MDL Objections

1. Increase in bulk/height is not permitted for 5-story building. *(MDL 211, MDL 4.35(a)(d), MDL 4.36)*
2. Any building, which exceeds 6 'stories' or sixty feet in height, shall be equipped with one or more passenger elevators. *(MDL 51.6, MDL 4.36)*
3. A public corridor with FPSC doors is required to separate egress stair from the residential unit(s). *(MDL 102.i, MDL 103.5, MDL 129.2, MDL 144.3, MDL 146, MDL 149)*
4. A 3-hour FR enclosure is required for stair. Stair shown is not fully enclosed and is open to a shared egress corridor with community facility. Every stair must be completely separated and have a fire separation from the public hall. *(MDL 148.3)*
5. Structural support for stair must be non-combustible in a 3-hour fire rated enclosure. *(MDL 148.3, MDL 4.25)*
6. Any building that is six stories or less may be of non-fireproof construction. Proposed penthouse addition exceeds six "stories" enlargement is not permitted. *(MDL 141, MDL 4.36)*
7. Entrance hall must be 3-hour non-combustible (not wood) enclosure (walls, floor & ceiling). *(MDL 149.2, MDL 4.25)*
8. All floors: stairs must be 3'-0" wide minimum and landings must be 3'-6" minimum. *(MDL 148.2)*
9. Fire escape terminating at rear yard must have access to street through a Fireproof passage. MD that is New Law Tenement for multiple dwelling erected after 4/18/1929 requires access directly to street (proposed passage is not considered fireproof because it is open to stair). *(MDL 231, MDL 53.2.b)*
10. Proposed Penthouse addition exceeds 33% of roof and must be counted as a 7th floor. Bulkhead and stairs must be included in floor area calculations. Memo 4.26.72, Memo 9.29.80, C26-406.2, ZR15-00, ZR 43-00, ZR 111-00. *(MDL 36)*; and

WHEREAS, this is an application pursuant to Multiple Dwelling Law ("MDL") § 310, to vary the noted sections of the MDL to allow for the legalization of an enlargement to two adjacent formerly five-story residential buildings (the "Buildings") within an R7B zoning district, contrary to MDL regulations; and

WHEREAS, the subject site is occupied by two adjacent seven-story (including penthouses) tenement buildings located on the south side of East 6th Street, between Avenue A and Avenue B which were constructed before 1901 (prior to a November 19, 2008 rezoning, the site was within an R7-2 zoning district); and

WHEREAS, the property owner (the "Appellant") constructed a sixth floor and a partial seventh floor, which resulted in MDL non-compliance, in 2007; an earlier iteration of the proposal sought the legalization of the sixth and seventh floors; and

WHEREAS, at the Board's direction, the Appellant eliminated the seventh floor from the plans and proposes now to legalize only the sixth floor; and

WHEREAS, after due notice by publication in *The City Record*, a public hearing was held on this application on September 22, 2009, with continued hearings on November 17, 2009, December 5, 2009, February 9, 2010, May 25, 2010 and July 27, 2010, and then to decision on August 3, 2010; 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, a tenant of the Buildings, represented by the Urban Justice Center (the "Opposition"), provided written and oral testimony in opposition to the application, citing the following primary concerns: (1) the Board should review the application pursuant to the

requirements of MDL § 310(2)(c), rather than MDL § 310(2)(a) and the Board does not have the ability to vary all of the noted MDL provisions within the context of MDL § 310(2)(c); (2) the required finding of unnecessary hardship was self-created due to the Appellant's choice to enlarge the Buildings and thus was avoidable; (3) the Buildings are not unique, as required by MDL § 310(2)(c); (4) the Buildings do not comply with the current zoning requirements, including maximum FAR; (5) any claim of good faith reliance fails because ongoing litigation provided indication that the approval was being contested; (6) the proposed fire safety measures do not provide equivalent safety to that which would be provided by full compliance with the MDL; (7) the hardship costs are not substantiated and the Buildings should be viewed as one building, rather than two, so that the Appellant does not rely on duplicative costs; and (8) the Board should consider each provision of the MDL associated with the objections, rather than MDL § 211 alone; and

WHEREAS, New York State Assemblyman / Speaker Sheldon Silver, Assemblyman James Brennan, and State Senator Thomas K. Duane provided testimony in opposition to the application citing concerns about fire safety, whether the Appellant established a hardship, and whether the enlarged Buildings are compatible with neighborhood character, in light of the 2008 rezoning; and

WHEREAS, City Council Member Rosie Mendez provided testimony in opposition to the application, citing concerns about fire safety and the absence of an elevator, and zoning bulk and use non-compliance; and

WHEREAS, Community Board 3, Manhattan, recommends disapproval of this application, citing concerns about neighborhood character, fire safety not achieving the equivalent of the MDL, the failure to establish that it would be too expensive to fully comply with the MDL; and zoning non-compliance; and

WHEREAS, the Greenwich Village Society for Historic Preservation provided written testimony in opposition to the application citing concerns about neighborhood character and zoning non-compliance; and

WHEREAS, the Good Old Lower East Side Inc. and the Tenants Association of 515 East 5th Street provided testimony in opposition to the application; and

Procedural History

WHEREAS, on October 3, 2007, DOB issued Alteration Permit No. 104744877 for the two-story vertical enlargement of the Buildings; and

WHEREAS, subsequently, a tenant of the Buildings filed an appeal to the Board of DOB's approval of the project on the basis that DOB did not have the jurisdiction to modify MDL requirements; and

WHEREAS, on November 22, 2008, under BSA Cal. Nos. 81-08-A, the Board concurred with the tenant and granted the appeal; and

WHEREAS, the Appellant (in the subject case) filed an Article 78 proceeding to challenge the Board's decision and the court directed the Appellant to first exhaust its administrative remedies by appealing DOB's objections to the Board pursuant to its authority to modify the MDL; and

WHEREAS, accordingly, the Appellant now requests that the Board vary the specified provisions of the MDL so that it may proceed with construction and complete the Buildings; and

WHEREAS, the Appellant makes the following primary arguments: (1) although it maintains that DOB has the authority to vary the MDL as requested, it finds that the Board has the authority to vary the requirements pursuant to MDL § 310(2)(a) and the Board should review the request under that section; (2) the Board should not consider the individual sections of the MDL, as noted in the objections, but should consider them all within the context of MDL § 211 – Height and Bulk, which is the source of all of all of the non-compliance; (3) strict compliance with the MDL would give rise to practical difficulty and unnecessary hardship, the required findings of MDL § 310(2); (4) the proposed alternative improvements, including sprinklering the entire building, serve to maintain the spirit of the law, preserve public health, safety, and welfare and provide for substantial justice, as required by MDL § 310(2); and (5) the construction was performed in good faith reliance on DOB approvals; and

The Board's Authority under MDL § 310(2)

WHEREAS, the Appellant seeks to have the Board modify the current objections issued by DOB by applying MDL § 310(2)(a), rather than MDL § 310(2)(c), in its analysis of the request to vary the noted MDL non-compliance; and

WHEREAS, MDL § 310 – Board of appeals - provides, in pertinent part:

> 2. Where the compliance with the strict letter of this chapter causes any practical difficulties or any unnecessary hardships the board shall have the power, on satisfactory proof at a public hearing, provided the spirit and intent of this chapter are maintained and public health, safety and welfare preserved and substantial justice done, to vary or modify any provision or requirement of this chapter, or of any rule, regulation, supplementary regulation, ruling or order of the department with respect to the provisions of this chapter, as follows:
>
> a. For multiple dwellings and buildings existing on July first, nineteen hundred forty-eight . . . and for multiple dwellings and buildings existing on November first, nineteen hundred forty-nine . . . provisions relating to:

(1) Height and bulk;
(2) Required open spaces;
(3) Minimum dimensions of yards or courts;
(4) Means of egress;
(5) Basements and cellars in tenements converted to dwellings.

* * *

c. For multiple dwellings and buildings erected or to be erected or altered pursuant to plans filed on or after December fifteenth, nineteen hundred sixty-one, or before such date provided such plans comply with the provisions of paragraph d of subdivision one of section twenty-six, provisions relating to:
(1) Height and bulk;
(2) Required open spaces; or
(3) Minimum dimensions of yards and courts.
Variations or modifications may be granted pursuant to Paragraphs b and c only on condition . . . that there are unique physical or topographical features, peculiar to and inherent in the particular premises, including irregularity, narrowness or shallowness of the lot size or shape and such variance would be permitted under any provision applicable thereto of the local zoning ordinance; and

WHEREAS, specifically, the Appellant relies on: (1) a plain reading of MDL § 310(2)(a), which does not prohibit the application of that section as the Buildings were constructed prior to 1948; and (2) the fact that a 1962 amendment to § 310(2) did not nullify or modify MDL § 310(2)(a) and statutory construction principles require an interpretation which gives effect to all the terms of the law; and

WHEREAS, the Appellant cites to McKinney's Consolidated Laws of New York, Book 1, Statutes § 144, "[i]n the course of constructing a statute, the court must assume that every provision thereof was intended for some useful purpose and [a] construction which would render a statute ineffective, must be avoided"; and

WHEREAS, the Opposition contends that the Board should review the request to vary the MDL requirements, pursuant to MDL § 310(2)(c); and

WHEREAS, the Opposition contends that (1) § 310(2)(a) was limited to pre-1948 buildings that are not being altered (as defined in the MDL) and (2) that the intent was that all buildings altered after 1948 were expected to comply with the MDL; and

WHEREAS, the Opposition notes that §§ 310(2)(b) and (c) specifically refer to "alterations" (a defined term in the MDL) unlike § 310(2)(a), which is silent as to the extent of construction; and

WHEREAS, the Opposition asserts that § 310(2)(c) should apply and that the Appellant would not be able to make the findings, which do not include provisions for means of egress and do include a requirement that the subject building be unique; and

WHEREAS, the Board has analyzed the threshold issue as to whether it should review the Appellant's requests to vary the MDL pursuant to MDL § 310(2)(a) or § 310(2)(c); and

WHEREAS, the Board notes that a plain reading of § 310 suggests that there are two possible sub-sections which apply to the Buildings – sub-section (a), which applies to buildings in existence on July 1, 1948, and sub-section (c), which applies to plans filed after December 15, 1961, as the Buildings were constructed before 1948 and the plans for the enlargement were filed after December 15, 1961; and

WHEREAS, the Board finds that statutory interpretation principles dictate that both sub-sections must have meaning and, thus, only one can be applicable to the analysis of the Buildings' non-compliance; and

WHEREAS, in answering the question of whether to apply (a) or (c) to the Buildings that were constructed prior to 1948 (as specified in (a)) and altered pursuant to plans filed after 1961 (as specified in (c)), the Board looks to the legislative history of § 310; and

WHEREAS, in consideration of the body of legislative history, which includes communication from the parties involved in the amendment process since the MDL's adoption in 1929, the Board concludes that the date of the original construction controls and sub-section (a) applies to pre-1948 buildings, whenever they are altered; and

WHEREAS, the Board notes that MDL § 310(2)(a) addresses buildings existing on July 1, 1948 (the effective date of the provision) and lists five building parameters which may be modified; it remains un-changed since its initial adoption; and

WHEREAS, further, the Board notes that sub-section (a), which was drafted to address buildings constructed prior to July 1, 1948, has not expired, has not been superseded by any amendments, and is in full force and effect for the current renovations of buildings constructed prior to July 1, 1948 and there is nothing in the legislative documents that reflects any intent to affect or limit the Board's power to grant modifications to the current renovation of buildings in existence on July 1, 1948; and

WHEREAS, the Board notes that a 1962 amendment includes the addition of MDL § 310(2)(c), which remains as originally adopted, and applies to buildings built or altered after December 15, 1961, pursuant to plans filed after December 15, 1961; and

WHEREAS, further, the Board notes that sub-section (b) was limited by term and has expired and since the expiration of sub-section (b), sub-section (c) assumed applicability over all buildings built after July 1, 1948 (which had historically been the subject of sub-section (b)); a reading that sub-section (c) applies to all buildings altered after December 15, 1961 would render sub-

section (a) ineffective; and

WHEREAS, accordingly, the Board finds that sub-section (c) applies only to the construction of new buildings and the renovation of buildings constructed after July 1, 1948; and

WHEREAS, although the Board notes that the Opposition is accurate that alteration has a specific meaning in the MDL, the contention that in the period between the 1948 adoption of MDL § 310 and the time of its 1962 amendment, pre-1948 buildings could only be modified in ways that did not reach the level of alteration, is strained; and

WHEREAS, additionally, the Board finds that there is no legislative history to support the claim that modifications listed within § 310(2)(a), including those to Height and Bulk, which would involve structural changes (which are specifically included in the definition of alteration) or Means of Egress (which are also specifically included in the definition of alteration) would be prohibited; and

WHEREAS, further, the Board notes that pre-1948 buildings include pre-1929 buildings, which were constructed prior to the adoption of the MDL, and there is no meaningful reason to restrict buildings built before the adoption of the MDL and those built between 1929 and 1948, which were required to be constructed in compliance with the MDL, in the same way; and

WHEREAS, finally, the legislative history reflects that the 1961 and 1962 amendments were enacted to address buildings constructed after 1948 and there is no indication that the amendments were intended to extend to pre-1948 buildings; and

WHEREAS, in conclusion, based on a review of the legislative history and prior Board decisions, the Board has determined that MDL § 310(2)(a) is the appropriate sub-section under which to review the subject appeal for modifications; and

WHEREAS, the Board notes that MDL § 310(2)(a) does not require a finding that the Buildings be unique; and

Modification of the MDL

WHEREAS, the Appellant requests that the Board modify MDL § 211, generally, rather than individual MDL provisions, and to view the application as one height and bulk waiver; and

WHEREAS, MDL § 211(1) – Height and Bulk – provides, in pertinent part:

> No tenement shall be increased in height so that its height shall exceed by more than one-half the width of the widest street upon which it stands. Except as otherwise provided in subdivision four of this section, no non-fireproof tenement shall be increased in height so that it shall exceed five stories, except that any tenement may be increased to any height permitted for multiple dwellings erected after April eighteenth, nineteen hundred twenty-nine, if such tenement conforms to the provisions of this chapter governing like multiple dwellings erected after such date; and

WHEREAS, the Appellant asserts that all non-compliance arises from the increase in height and bulk and thus the Board should view all of the non-compliances within the context of height and bulk, rather than as individual conditions, as identified by DOB in its objections; and

WHEREAS, the Appellant asserts that a height and bulk waiver, as permitted by MDL § 310(2)(a), would satisfy all of the outstanding objections because all of the objections arise from the increase in height and bulk and, because the Board can modify height and bulk, it can modify every requirement that is associated with the increase in height and bulk; and

WHEREAS, the Appellant asserts that there is no need to apply the required MDL § 310 findings to each of the MDL objections, but rather the Board should just apply the findings once to the overall building requirements; and

WHEREAS, although the Appellant requests that the Board consider all of the objections within the context of a single umbrella waiver to height and bulk, it does address each DOB objection for MDL non-compliance, by section, and describes the proposed measures to provide a form of equivalency in support of its modification request; and

WHEREAS, the Opposition argues that the broad approach that the Appellant suggests is not within the spirit of the law; and

WHEREAS, the Board has determined that the Appellant's argument about whether or not MDL § 211 covers all of the objections not convincing since an individualized approach is required to determine whether there is practical difficulty and whether the spirit of the law is maintained with the modifications; and

WHEREAS, further, the Board finds 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 express authority to vary; and

WHEREAS, thus, the Board does not find it necessary to make a determination in the context of this appeal as to whether the general provision of MDL § 211(1) – Height and Bulk – or the Board's specific enabling section, MDL § 310(2)(a), is the only means of analyzing the requests to modify the cited MDL provisions; and

WHEREAS, the Board finds it appropriate to analyze the Appellant's request as individual areas of non-compliance, pursuant to its express authority in MDL § 310(2)(a); and

WHEREAS, the Board notes that the Opposition disagrees with the Appellant that all objections arise under height and bulk and are contemplated by MDL §

211, rather than MDL 310(2), albeit sub-section (c), but concedes that all of the MDL objections are related to egress and fire protection; and

The Practical Difficulty or Unnecessary Hardship Finding

WHEREAS, the Appellant describes each of the requirements of bringing the Buildings into compliance with the MDL and the practical difficulties in terms of construction-related logistics and the unnecessary hardship in terms of monetary expenditure, associated with each relevant provision; and

WHEREAS, specifically, the Appellant notes the practical difficulty of widening hallways and stairways, which includes relocating building infrastructure, redesigning apartments (some rooms may be rendered noncompliant with other provisions of the MDL), and removal of floors, beams, walls and joists; and

WHEREAS, the Opposition asserts that the difficulty and hardship are self-created since the Appellant chose to enlarge the Buildings and that, if it had not chosen to do so, it would not have been required to comply with the MDL; and

WHEREAS, the Opposition deems that certain requirements, such as the removal of the seventh floor are not legitimate hardships since the removal would not be required if the Appellant had not constructed an enlargement contrary to the MDL; and

WHEREAS, the Board agrees in part with the Appellant and, in part, with the Opposition; and

WHEREAS, specifically, the Board agrees with the Appellant that even if the Buildings were viewed as they were prior to any of the subject construction, there is logistical difficulty associated with achieving certain of the MDL requirements, including widening existing staircases and hallways and adding a vestibule, which in the Buildings, would require the redesign of infrastructure and a significant portion of the individual apartments; and

WHEREAS, as to the monetary expenditures, the Board accepts that there would be significant costs associated with the noted changes, but is not required to review a financial analysis within the context of the requested variance to the MDL as it may make the finding based on practical difficulty or unnecessary hardship; and

WHEREAS, however, the Board agrees with the Opposition that the costs and labor associated with demolishing the seventh floor should not be included in an analysis of hardship since the Appellant constructed it without consideration of the building-wide implications, per the MDL, of adding a seventh floor; and

WHEREAS, the Board finds the Appellant's assertion of hardship associated with the removal of the partial seventh floor space to be unconvincing and rejected the Appellant's initial proposal which included the seventh floor; and

WHEREAS, the Board agrees with the Appellant that whether the modifications required to the common space throughout the Buildings were performed at the outset of the project or now, after construction has occurred, there would be practical difficulty in achieving a majority of the conditions in strict compliance with the MDL; the removal of the seventh floor, which triggers a host of requirements beyond the numerous requirements triggered by the sixth floor, eliminates requirements including that the Buildings be fireproof, as opposed to the non-fireproof condition which is permitted for buildings up to a height of six stories; and

WHEREAS, thus, the Board agrees with the Opposition that the removal of the seventh floor does not reflect a practical difficulty or hardship; and

WHEREAS, accordingly, the Board agrees that the Appellant has established a sufficient level of practical difficulty and hardship for compliance with the MDL requirements unrelated to the seventh floor, rejects the assertions of practical difficulty for the seventh floor and has directed the Appellant to remove it, which the Appellant has agreed to do; and

The Proposed Building Conditions

WHEREAS, throughout the hearing process, the Appellant proposed a variety of safety measures, including those reflected on the original DOB approved plans, and provided analysis from fire safety consultants as to the fire safety of certain conditions; and

WHEREAS, the additional measures that the Appellant has included or proposes to include, as reflected on the proposed plans, are the (1) installation of a full automatic wet sprinkler system in the common areas, cellar, and all apartment interiors; (2) installation of hard-wired smoke detectors and emergency lighting with back-up battery power in all apartments and common areas; (3) installation of new fire escapes and ladders at the front and rear of the Buildings; (4) replacement of wood apartment doors with one and one-half-hour fire-rated self-closing metal doors; (5) installation of two layers of gypsum board on either side of the hallway and stairway walls to achieve three-hour equivalent fire separation; (6) replacement of stair treads with non-combustible material (marble or stone); (7) addition of two layers of gypsum to the underside of the staircases; (8) addition of a skylight at the top of each stairway (with a minimum area of 20 sq. ft.) and a ridge vent (with a minimum area of 40 sq. in.) with wire screen above and below plain glass as per MDL § 26.2; (9) installation of a layer of gypsum board on the entire cellar ceiling; (10) installation of non-combustible metal deck with poured concrete of a thickness of 45 inches between first floor joists and non-combustible finished floor in the ground floor entrance hall and public hallway to achieve three-hour fire separation; and (11) installation of non-combustible metal studs, one-inch core board, and two layers of gypsum board beneath second-floor joists in the first floor entrance hall and public hallway to achieve an equivalent three-hour fire separation; and

WHEREAS, the Appellant included submissions from fire safety consultants and information from the National Fire Safety Protection Agency, which advocates the installation of sprinkler systems and documents improved fire safety with such measures; and

The Spirit of the Law

WHEREAS, the Board has reviewed the proposed fire safety measures in light of the findings required by MDL § 310(2)(a) "[the Board has the power to vary or modify any provision of this chapter] provided the spirit and intent of this chapter are maintained and public health, safety and welfare preserved and substantial justice done" and finds that the measures meet the requirements of maintaining the spirit and intent of the law, to allow for the alteration of multiple dwellings while providing additional measures in the spirit of those contemplated by the specified requirements of the MDL; and

WHEREAS, as noted, the Board agrees with the Opposition that there is no basis to support the inclusion of a seventh floor, primarily because the addition of any floor above the sixth floor triggers a requirement that the Buildings be fireproof and triggers the requirement for an elevator; and

WHEREAS, the Board recognizes the significant change in the requirements for a six or fewer story building (that it may be non-fireproof) per the MDL and the requirements for a seven or greater story building: (1) that it be fireproof and (2) that it provide an elevator, to be compelling and that the spirit of the law would be compromised with the allowance of the seventh floor; and

WHEREAS, the Board notes that the requirements that the Buildings be fireproof and provide an elevator, which the Appellant asserts would be practically difficult and impose a hardship, are eliminated with the elimination of the seventh floor; and

WHEREAS, during the hearing process, the Board was clear that it would not support a proposal that included a seventh floor and, accordingly, the Appellant removed a seventh floor from the plans; and

WHEREAS, the Board does not approve any construction on the roof that constitutes a floor, for MDL purposes; and

WHEREAS, the Board acknowledges that there are practical difficulties with bringing the subject pre-1929 Buildings into compliance with the MDL; and

WHEREAS, however, the Board recognizes that the MDL contemplates the enlargement of buildings and that it has express authority to approve such proposals, provided that the findings are met; and

WHEREAS, the Board finds that public health, safety, and welfare are preserved and substantial justice is done if the increased measures are installed and maintained; and

WHEREAS, specifically, the Board finds that the installation of full sprinklering throughout the public spaces and individual apartments, rooftop ventilation, smoke detectors and emergency lighting serve to improve fire suppression and aid emergency response; and

WHEREAS, further, the Board finds that increasing the fire-rating of the public halls and staircases, and doors promotes the goal of improved fire separation standards and protected egress; and

WHEREAS, however, the Board notes that it does not set forth any requirement or determination as to the materials proposed and, instead, relies on DOB to establish whether the proposed materials for the walls, ceilings, and stairs, where noted on the plans, achieve the proposed fire-rating or whether alternate materials or construction are required to achieve the proposed fire-rating; and

WHEREAS, the Board notes that, the Appellant has identified different levels of fire-rating throughout the hearing process and that different combinations of materials and fire-rating have been identified by the Appellant's team at hearing, in written submissions, and on plan, and, thus, the Board requests that DOB review the final proposal to confirm the fire-rating; and

WHEREAS, the Board has not imposed the use of certain construction methods or materials, but rather accepts the proposed degree of fire-rating as being within the spirit of the law; and

WHEREAS, the Board notes that the MDL does not contain a definition for "equivalency" and, thus, any reference to equivalency, in the context of fire-rating, must be established by the Appellant and approved by DOB; and

WHEREAS, accordingly, the Board finds that the proposed construction meets the findings of MDL § 310(2)(a) to the extent that the proposed materials achieve the level of fire-rating the Appellant represents they do, subject to DOB review; and

Good Faith Reliance

WHEREAS, the Appellant makes a supplemental argument that it relied in good faith upon approvals from DOB and its precedent for approving comparable fire safety measures in lieu of MDL compliance; and

WHEREAS, the Board notes that it has not reviewed the Appellant's claim of good faith reliance because it has not completed the good faith reliance analysis, which includes consideration of whether the permit was valid when issued and whether there was a reasonable basis to charge the Appellant with constructive notice that the permit should not have been issued; and

WHEREAS, instead, the Board considered the findings required under MDL § 310(2)(a) and whether the Appellant has made such findings and warrants the modifications it requests, without addressing the good faith reliance claim; and

WHEREAS, the Board notes that DOB approved an earlier iteration of the proposed measures and

accepted the Appellant's original plan; and

Conclusion

WHEREAS, 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 varies the noted MDL sections except those within DOB objections numbers 2, 6, and 10 because it deems that the non-compliances associated with the addition of the seventh floor cannot be remedied in a way that is within the spirit of the law; and

WHEREAS, in reaching this determination, the Board notes that its finding is based on the unique facts related to the physical conditions of the site as presented in the instant application, and that this decision does not have general applicability to any pending or future Board application; and

WHEREAS, the Board notes that, according to the Appellant, the proposal will be in full compliance with all other relevant regulations including the Zoning Resolution; and

WHEREAS, the Board does not take any 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, the Board's determination in this matter is limited to conditions associated with the cited MDL objections, dated July 6, 2009, and not with any outstanding or future zoning or any other kind of objections; and

WHEREAS, as to the Appellant's assertion that it establishes equivalent fire-ratings, such as three-hour equivalent fire-rating for the hallway walls, the Board requests that DOB review and approve the conditions for compliance with such a requirement and takes no position as to the capacity of the materials used or their fire safety rating.

Therefore it is Resolved, that the decision of the Manhattan Borough Commissioner, dated July 6, 2009, 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 26, 2010" nine (9) sheets and "Received July 29, 2010" one (1) sheet; and on further condition:

THAT the construction shall include the: (1) installation of a full automatic wet sprinkler system in the common areas, cellar, and all apartment interiors; (2) installation of hard-wired smoke detectors and emergency lighting with back-up battery power in all apartments and common areas; (3) installation of new fire escapes and ladders at the front and rear of the Buildings; (4) replacement of wood apartment doors with one and one-half-hour fire-rated self-closing metal doors; (5) installation of sufficient materials in the hallway and stairway walls to achieve three-hour fire separation; (6) replacement of stair treads with non-combustible material (marble or stone); (7) addition of two layers of gypsum to the underside of the staircases; (8) addition of a skylight at the top of each stairway (with a minimum area of 20 sq. ft.) and a ridge vent (with a minimum area of 40 sq. in.) with wire screen above and below plain glass as per MDL § 26.2; and (9) installation of sufficient materials within the cellar ceiling, first floor entrance hall (floor, ceiling, and walls) and public hallway walls to achieve three-hour fire separation within the first floor entrance hall and the public hallways on all floors; and

THAT the seventh floor be removed and all proposed fire safety measures be installed by February 3, 2011 and a Certificate of Occupancy be obtained by August 3, 2012;

THAT any additional materials installed to increase the fire-rating of the public halls or staircases shall not reduce the width of the public halls or staircases any more than what is reflected on the proposed plans; if additional materials beyond those reflected on the plans are required, they shall be installed on the side of the walls within the apartments;

THAT the Department of Buildings shall review all construction materials to confirm compliance with the required fire-rating; where conditions in the resolution are less specific as to the proposed materials and more restrictive as to fire-rating than the conditions reflected on the approved plans, the conditions in this resolution shall be controlling;

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 3, 2010.

A true copy of resolution adopted by the Board of Standards and Appeals, August 3, 2010.
Printed in Bulletin No. 32, Vol. 95.

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