67-07-A
APPLICANT – Kevin Finnegan, Esq., for Benjamin Shaul, Magnum Mgmt., owner.
SUBJECT – Application July 17, 2007 – An appeal seeking to revoke permits and approvals that allow the construction of a penthouse that exceeds the permitted height limitations governed by ZR 23-692 (Sliver Law). R7-2 Zoning District.
PREMISES AFFECTED – 515 East 5th Street, between Avenue A and Avenue B, Block 401, Lot 56, Borough of Manhattan.
COMMUNITY BOARD #3M
APPEARANCES –
For Applicant: Kevin Finnegan.
For Opposition: Marivin Mitzner.
ACTION OF THE BOARD – Appeal granted.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown and Commissioner Hinkson.....4
Negative:.....0
THE RESOLUTION:

WHEREAS, the instant appeal comes before the Board in response to a Final Determination letter dated February 15, 2007 by the Manhattan Borough Commissioner of the NYC Department of Buildings ("DOB") (the "Final Determination") addressed to Manhattan Borough President Stringer, Councilmember Mendez, and District Manager of Community Board 3 Stetzer, with respect to Alteration Application No. 104368845; and

WHEREAS, the Final Determination states, in pertinent part:

> "This letter is in reference to your correspondence to me, dated September 18, 2006, regarding the Department's interpretation of NYC Zoning Resolution (ZR) § 23-692 (Sliver Law) in relation to the above referenced alteration application. Specifically, you requested that the Department reconsider, in light of ZR § 11-22, its approval of the applicant's exclusion of a penthouse from the calculation of building height under the Sliver Law.
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> "Although your letter refers to ZR § 11-22 as a provision that provides guidance in the calculation of building height under the Sliver Law, this statutory section is not applicable. Section 11-22 addresses the application of overlapping or contradictory regulations. Here, there is neither overlap nor contradiction.
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> "It has been the Department's practice to allow building height (which is not a defined term in the Zoning Resolution) of penthouses to exceed the width of the street for buildings covered by the Sliver Law in instances similar to the project in question, particularly in cases such as this where the penthouse in not visible from the street. It would be inconsistent with these prior decisions to overturn the approval of the penthouse here. It is the Department's position that the addition of a penthouse at the building in question does not violate the Sliver Law as the continuity of the street wall has been maintained.
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> In accordance with this interpretation, the penthouse, as constructed with a twenty foot setback from the street wall, complies with ZR § 23-692.
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> "Please accept this letter as a final determination by the Department, appealable to the Board of Standards and Appeals"; and

WHEREAS, a public hearing was held on this appeal on July 17, 2007, after due notice by publication in *The City Record*, and then to decision on September 11, 2007; and

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

WHEREAS, a representative from Borough President Stringer's Office testified at hearing in support of the instant appeal; and

WHEREAS, a representative of Council Member Mendez' Office testified at hearing in support of the instant appeal; and

WHEREAS, a representative of State Senator Connor's Office testified at hearing in support of the instant appeal; and

WHEREAS, a representative of State Assembly Speaker Silver's Office testified at hearing in support of the instant appeal; and

WHEREAS, representatives of several civic associations testified at hearing in support of the instant appeal; and

WHEREAS, DOB, Appellant Tenants Association of 515 East 5th Street, and the owner of 515 East 5th Street (the "Owner" and the "Building") have been represented by counsel throughout this Appeal; and

PROCEDURAL HISTORY

WHEREAS, the instant appeal concerns the addition of a new sixth floor and penthouse, to be occupied by four duplex apartments, to the Building, a five-story "old law" tenement, which is located in an R7-2 zoning district; and

WHEREAS, an alteration permit application was filed under DOB's professional certification program, and the initial work permit was issued on March 31, 2006; and

WHEREAS DOB subsequently conducted a special audit of the approved plans, and on May 8, 2006 issued an Intent to Revoke Approval(s) based on nineteen Building Code and zoning objections; and

WHEREAS, Objection No. 6 in the May 8, 2006

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Intent to Revoke Approval(s) stated, in pertinent part;

"ZR 23-692: Sliver Law: Height Regulation Narrow Building:

a. Proposed vertical enlargement is higher than 60' which is width of narrow street, and it is contrary to Resolution 23-692, hence not permitted.

Indicate compliance in height and setback diagram"; and

WHEREAS, the plans were revised to correct various violations and were approved on June 29, 2006; and

WHEREAS, the plans approved on June 29, 2006 still showed a building exceeding the 60-foot maximum height that Appellant argues is imposed by Z.R. § 23-692 (the "Sliver Law"); and

WHEREAS, on July 26, 2006, Manhattan Borough President Stringer, Council Member Mendez and Community Board 3 District Manager Stetzer wrote to the Manhattan Borough Commissioner requesting reconsideration of its approval of the revised plans; and

WHEREAS, although the Manhattan Borough Commissioner responded on August 25, 2006 and issued a second Intent to Revoke Approval(s) and Permit(s) and a Partial Order to Stop Work Immediately, he maintained that the amended plans did not violate the Sliver Law; and

WHEREAS, on September 18, Manhattan Borough President Stringer, Council Member Mendez and Community Board 3 District Manager Stetzer requested that the Manhattan Borough Commissioner reconsider his application of the Sliver Law in light of Z.R. §23-62, which does not include penthouses among "permitted obstructions"; and

WHEREAS, on February 15, 2007 the Manhattan Borough Commissioner issued the Final Determination, cited above, that forms the basis of the instant appeal; and

PROVISIONS OF THE ZONING RESOLUTION AND BULDING CODE RELEVANT TO THIS APPEAL

WHEREAS, the Sliver Law (comprised of Z.R. §§ 23-691 and 692, enacted in 1983, established limited height districts and regulates the height of new buildings and enlargements of existing buildings that have street walls of 45 feet or less in width), reads, in pertinent part:

"Subject to applicable front height and setback regulations, or any height limitations of the underlying district, no such new or *enlarged building* shall exceed a height equal to the width of the abutting *street* on which it fronts or 100 feet, whichever is less. When the *street walls* of a new *building* or *enlargement* front on two *streets* on a *corner lot*, the height of the *building* shall not exceed the width of the abutting *wide street* or 100 feet, whichever is less.

"However, if the *street wall* of the new or *enlarged building* abuts a contiguous and fully attached existing *building street wall* that exceeds the height permitted above, such new or enlarged building street wall may reach the height of:

(a) the tallest of such abutting building walls if it fronts on a *wide street*;

(b) the lowest of such abutting building walls if it fronts on a *narrow street* provided that:

(1) there shall be no penetration of the *sky exposure plane* required by the underlying districts for any portion of such new or *enlarged buildings*; and

(2) such height does not exceed any height limitation of the underlying district"; and

WHEREAS, Z.R. § 23-62 (titled "Permitted Obstructions"), relied upon by Appellant, reads, in pertinent part:

"In all *Residence Districts*, except as provided in Section 23-621 (Permitted obstructions in certain districts), the following shall not be considered obstructions and may thus penetrate a maximum height limit or *front* or *rear sky exposure planes* set forth in Sections 23-63 (Maximum Height or Walls and Required Setbacks), 23-64 (Alternate Front Setbacks) or 23-69 (Special Height Limitations):

(a) Balconies, unenclosed subject to the provisions of Section 23-13;

(b) Chimneys or flues, with a total width not exceeding 10 percent of the *aggregate width of street walls* of a *building* at any level;

(c) Dormers having an *aggregate width of street walls* equal to not more than 50 percent of the width of the *street wall* of a *detached* or *semi-detached single-* or *two-family residence*;

(d) Elevators or stair bulkhead, roof water tanks or cooling towers (including enclosures), each having an *aggregate width of street walls* equal to not more than 30 feet. However, the product, in square feet, of the *aggregate width of street walls* of such obstructions facing each *street* frontage, times their average height, in feet, shall not exceed a figure equal to four times the width, in feet, of the *street wall* of the *building* facing such frontage;

(e) Flagpoles or aerials;

(f) Parapet walls, not more than four feet high;

(g) Wire, chain link or other transparent fences.

> Building columns having an aggregate width equal to not more than 20 percent of the *aggregate width of street walls* of a *building* are a permitted obstruction, to a depth not exceeding 12 inches, in an *initial setback distance*, optional front open area, or any other required setback distance or open area set forth in Sections 23-63, 23-64, or 23-65 (Tower Regulations)"; and

WHEREAS, § 27-306(c) of the Building Code, relied upon by DOB in interpreting Z.R. § 23-692, reads, in pertinent part:

> "In applying the provisions of this code governing height limits, the following appurtenant structures shall not be included in the height of the building unless the aggregate area of all such structures exceeds thirty-three and one-third percent of the area of the roof of the building upon which they are erected:
>
> * * *
>
> (c) Roof structures, bulkheads, and penthouses"; and

DISCUSSION

A. The Basis of the Appeal – The Plain Meaning of the Zoning Resolution

WHEREAS, Appellant, citing Raritan Development Corp. v. Silva, 91 N.Y.2d 98, 107 (1997), argues that the plain language of the Sliver Law is unambiguous, and that under applicable New York decisional law on statutory interpretation, DOB may not go outside the zoning text, as it has by referring to the Building Code, to interpret the Sliver Law's unambiguous language; and

WHEREAS, the Sliver Law regulates new buildings or enlargements of existing buildings such that "no such new or *enlarged building* shall exceed a height equal to the width of the abutting *street* on which it fronts or 100 feet, whichever is less"; and

WHEREAS, it is undisputed that the width of East 5th Street is sixty (60) feet; and

WHEREAS, Appellant argues that the height of the Building is therefore limited to sixty (60) feet; and

WHEREAS, it is also undisputed that the height of the Building, *including the penthouse*, exceeds sixty (60) feet; and

WHEREAS, Appellant therefore concludes that DOB erred in permitting the enlargement of the Building; and

WHEREAS, Appellant notes that the term "height" (although not defined) appears in the Zoning Resolution's chapter titled "Bulk Regulations for Residential Buildings in Residential Districts" over 200 times; and

WHEREAS, Appellant further cites Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583 (1998) for the proposition that, "In construing statutes, it is a well-established rule that resort must be had to the natural significance of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning"; and

WHEREAS, Appellant concludes that DOB acted unreasonably in looking beyond the plain language of the Zoning Resolution to the language of the Building Code in order to construe the meaning of the Sliver Law; and

WHEREAS, Appellant also argues that even if DOB were justified in looking beyond the Zoning Resolution to determine the height of the building, DOB's application of the Penthouse Rule (described below) is arbitrary and capricious when viewed in the context of the September 24, 2003 report of the DOB Professional Technical Forum, which indicates that there is no exception for penthouses under the Sliver Law and the position adopted by DOB in BSA Cal. No. 15-05-A, in which DOB objected to a new building application on the basis that the "Proposed Penthouse penetrates special height limitation of 60' (width of abutting street) contrary to Resolution 23-692"; and

WHEREAS, finally, Appellant states that DOB's interpretation of the Sliver Law is the equivalent of an act of legislation, which requires action by the City Planning Commission and the City Council, or the equivalent of the grant of a variance, which requires action by the Board, and as such is outside DOB's authority; and

B. The Department of City Planning's Submission

WHEREAS, the Department of City Planning ("DCP"), although not a party, submitted a letter to the Board in connection with the instant appeal; and

WHEREAS, DCP states that zoning rules have been frequently applied without the need for a special definition of "height"; and

WHEREAS, DCP, referring to the definition of "building" as "any structure which (a) is permanently affixed to the land; (b) has one or more floors and a roof; and (c) is bounded by either open area or the *lot lines* of a *zoning lot*," states that the "height of a building" is therefore "the height measured up to the roof level, exclusive of permitted obstructions"; and

WHEREAS, DCP notes that "building height" and "*building* height" are used 73 times in the Zoning Resolution without being defined; and

WHEREAS, DCP further observes that the terms "building height" and "*building* height" are customarily applied to govern permissible heights of Quality Housing buildings and buildings in contextual districts, limited height districts, special purpose districts, and on the waterfront; and

WHEREAS, DCP concludes that in a case "where the abutting street is a narrow street (60 feet) and the provisions of the third paragraph of Z.R. § 23-692

[which allows the street wall of the building to reach the height of an adjacent building] do not apply, the maximum permitted height of the "sliver" building, or enlargement thereof, is 60 feet, as measured from the curb level to the highest roof level, and only the items listed in the Zoning Resolution as permitted obstructions may exceed that height"; and

C. DOB's Analysis of the Zoning Resolution and its Interpretive Authority

WHEREAS, DOB argues that "the Zoning Resolution rarely contains plain language," and that therefore DOB must attempt to construe the Zoning Resolution in accordance with the intent of the City Planning Commission in adopting the Sliver Law; and

WHEREAS, DOB argues that because "height" is not defined within the Zoning Resolution, it is within DOB's authority to construe the meaning of "height" in interpreting the Zoning Resolution in a way that gives effect to the legislative intent of its drafters; and

WHEREAS, DOB contends that the legislative intent in enacting the Sliver Law was not to restrict density but was aesthetic in nature; and

WHEREAS, DOB reiterates the rationale of the Final Determination that it is permissible for a penthouse to exceed the height limitations of Z.R. § 23-692 if it complies with the Penthouse Rule, particularly when the penthouse is not visible from the street and the penthouse is set back; and

WHEREAS, pursuant to the Penthouse Rule, codified in Building Code § 27-306(c), DOB does not include a penthouse in the calculation of the height of a building unless its area exceeds one-third of the area of the roof; and

WHEREAS, DOB also asserts that the intent of the Sliver Law is to regulate the fronts of buildings and to encourage contextual buildings, and not to prevent building owners from constructing penthouses; and

WHEREAS, DOB further contends that it is within DOB's authority to turn to the Building Code in an effort to define "height"; and

WHEREAS, DOB also argues that its interpretation of "height" is similarly consistent with the Multiple Dwelling Law; and

WHEREAS, DOB therefore concludes that it properly excluded the penthouse in its calculation of the height of the Building; and

D. Owner's Interpretations of Applicable Sections of the Zoning Resolution and the Board's Authority

1. The Penthouse is not Part of the Building and Therefore Should not be Included in Measuring the Height of the Building

WHEREAS, the Building's Owner, through counsel, contends that while the words of the Zoning Resolution are generally "plain English words," that within the framework of the Zoning Resolution as a whole they are ambiguous and require interpretation to give effect to the legislative intent of the City Planning Commission; and

WHEREAS, the Owner notes that "penthouse" is not defined within the Zoning Resolution; and

WHEREAS, Owner notes also that Z.R. § 23-691 regulates "buildings or other structures," and that Z.R. § 23-692 regulates only the height of "buildings"; and

WHEREAS, Owner also observes that Building Code § 27-232 defines a penthouse as "an enclosed structure on or above the roof of any part of a building" and that therefore a penthouse must be distinct from the building itself; and

WHEREAS, based on the foregoing, Owner contends that penthouses are not part of the buildings to which they are attached, but are rather "other structures," and are therefore not regulated under Z.R. § 23-692, the applicable section of the Sliver Law, which regulates "buildings" only; and

WHEREAS, Owner further argues that the Zoning Resolution acknowledges that such "other structures" are different from buildings by describing under what circumstances penthouses are deemed to contain floor area; and

WHEREAS, Owner concludes that because a penthouse is an "other structure" distinct from a building, that the height of a penthouse cannot be included in the height of a building in applying Z.R. § 23-692, and that therefore the Building does not violate the Sliver Law; and

2. Equitable and Other Relief

WHEREAS, Owner, relying on the Board's resolution in BSA Cal. No. 152-97-A (the "Travelers Umbrella"), also argues that if the Board does grant the instant appeal, it has the jurisdiction to fashion equitable relief so as to make its rule prospective only and not to require the Owner either to remove the existing penthouse or to apply for relief in the form of a variance from the Board; and

WHEREAS, alternatively, relying on BSA Cal. Nos. 330-03-A and 132-03-A, Owner argues that the Board should, within the context of the instant appeal, pursuant to City Charter § 666(7) grant the equivalent of a variance to permit the penthouse that has been constructed; and

E. Appellant's Response to DOB's and Owner's Arguments

WHEREAS, Appellant argues that even if the language of the Sliver Law were deemed to be ambiguous, DOB exceeded its authority by going beyond the text of the Zoning Resolution to interpret Sliver Law such that the penthouse should not be included in the "height of the building," and that the Zoning Resolution itself sets standards for measuring building height; and

WHEREAS, Appellant argues that assuming, *arguendo*, that the Sliver Law were ambiguous, DOB should have relied on Z.R. § 23-62 ("Permitted Obstructions"), which lists permitted obstructions that "may thus penetrate a maximum height limit" and which does *not* list penthouses among such permitted obstructions; and

WHEREAS, Appellant concludes that the penthouse must be included in the "height of the building," and that the Building therefore violates the provisions of the Sliver Law; and

WHEREAS, furthermore, Appellant argues that where the language of the Zoning Resolution is unambiguous, DOB's past practice in applying the "Penthouse Rule" is not relevant and should carry no weight in the Board's resolution of the instant appeal, and that even if it were permissible for DOB to have created the Penthouse Rule for the purpose of interpreting Z.R. § 23-692, DOB has not applied the Penthouse Rule consistently and has applied the Penthouse Rule inconsistently within the context of the events that form the basis of the instant appeal; and

WHEREAS, Appellant observes that because the definition of a building's "floor area" in Z.R. § 12-10 specifically includes "floor space used in penthouses," Owner's argument that a penthouse is an "other structure" and not part of a building is incorrect; and

WHEREAS, Appellant further observes that the Building Code, relied upon by DOB in the Penthouse Rule, also defines a building so as to include appurtenant structures such as penthouses; and

WHEREAS, Appellant observes that with respect to Owner's request that the Board exercise its authority pursuant to City Charter § 666(7) to fashion a resolution that does "substantial justice" to Owner, the proper procedure for such relief is an application for a variance pursuant to Z.R. § 72-21; and

WHEREAS, Appellant further notes that Owner's argument that it justifiably relied on DOB's policy in applying the Penthouse Rule to interpret the Sliver Law is weak because DOB's interpretations of the Sliver Law have been inconsistent, even as applied to the events giving rise to the instant appeal, and therefore could not have created any justifiable expectation about the application of the Sliver Law to the Building; and

WHEREAS, with respect to Owner's request that the Board exercise its alleged equitable powers to protect Owner from having to demolish the penthouse it constructed atop the Building, Appellant notes that it has pursued the instant appeal at considerable expense, and that it would be unfair to Appellant for the Board to issue a merely advisory opinion, rather than to grant appellant the specific relief to which it is entitled; and

CONCLUSION

WHEREAS, the Board agrees with Appellant and DCP that the language of Z.R. § 23-692 is unambiguous with respect to the meaning of "height of the building" and its limitation to the width of the abutting street; and

WHEREAS, the Board further agrees that merely because "height" is not defined in the Zoning Resolution does not mean that the word is ambiguous, but rather that "height,' which, as both Appellant and DCP have observed, is used repeatedly throughout the Zoning Resolution, has a commonly accepted meaning and does not require definition in the Zoning Resolution; and

WHEREAS, the Board is unpersuaded by DOB's and Owner's attempts to create ambiguity in the Zoning Resolution where none exists; and

WHEREAS, specifically, the distinction between the use of "building or other structure" in Z.R. § 23-691 and "building" in Z.R. § 23-692 does not render ambiguous the meaning of "building" or "building height" or justify turning to the Building Code to clarify an ambiguity that does not exist; and

WHEREAS, the Board agrees with DCP that the definition of "building" as "any structure which (a) is permanently affixed to the land; (b) has one or more floors and a roof; and (c) is bounded by either open area or the *lot lines* of a *zoning lot*," reinforces the plain meaning of height as measured to the highest roof level, excluding any specifically designated "permitted obstructions"; and

WHEREAS, even if the Board credited DOB's argument that the language of the Sliver Law is ambiguous, DOB has not established that the text was not intended to restrict the overall heights of buildings or to give DOB the authority to establish its own exemptions to the requirements of the Sliver Law, such as DOB's Penthouse Rule; and

WHEREAS, the Board finds that the fact that the Sliver Law establishes exceptions to the general height limitation by permitting the street wall of the new or enlarged building to match the street wall of an adjacent building in certain circumstances argues against DOB's position that CPC intended for DOB to create the exceptions to the Sliver Law; and

WHEREAS, as to DOB's argument, the Board notes that DOB provides no support from the CPC Report for its argument that the Sliver Law was intended to be limited to serving an aesthetic purpose and to regulating front walls only, and therefore the Board is unconvinced that the Sliver Law should be so narrowly read; and

WHEREAS, the Board agrees with Appellant that the Building Code cannot override the Zoning Resolution and the limitations it establishes on the heights of buildings; and

WHEREAS, the Board agrees with Appellant that a penthouse is part of a building for the purpose of

applying the Sliver Law, and that therefore the penthouse must be included in measuring the height of the Building; and

WHEREAS, the Board further agrees that, in the absence of action by the Board or by the City Planning Commission and City Council, DOB has exceeded its authority both in applying the Penthouse Rule and in limiting its application to instances in which the penthouse is set back and not visible from the street, such action being equivalent to a legislative act; and

WHEREAS, as to Owner's arguments with respect to equitable considerations, the Board disagrees that any hardship that may be imposed on the Owner is relevant to its disposition of the instant appeal; and

WHEREAS, with respect to Owner's argument that if the Board grants the appeal it should exercise equitable powers so that its determination only applies prospectively and would not apply to the Building, the Board does not have the authority simultaneously to determine that the building permits for the expansion of the Building were issued unlawfully and to permit DOB to ignore that fundamental fact; and

WHEREAS, furthermore, as an administrative body, the Board does not have the equitable powers of a court to address any alleged unfairness to the Owner that may result from its decision in the instant appeal; and

WHEREAS, the Board rejects Owner's argument that the Board should exercise its jurisdiction under § 666(7) of the City Charter to create a variance to permit the penthouse addition to the Building to remain despite its noncompliance with zoning; and

WHEREAS, the proper procedure to request such relief from zoning is a variance application in which, after public notice and hearing, the Board could grant such variance pursuant to Z.R. § 72-01(b) and other applicable provisions of Article VII, Chapter 2 of the Zoning Resolution, which define the procedures and standards pursuant to which the Board can vary the Zoning Resolution; and

WHEREAS, the Board will not act on Owner's suggestion that it could fashion relief for Owner from its decision in the instant appeal in the absence of a demonstration on the record that Owner can meet the five findings required for a variance pursuant to Z.R. § 72-21; and

WHEREAS, further with respect to the Board's authority to vary the Zoning Resolution for the Building in the instant appeal, the Board disagrees that the prior Board resolutions cited by Owner are applicable: in BSA Cal. No. 330-03-A the Board required a demonstration of the required statutory findings under the MDL and furthermore limited the applicability of its resolution of that appeal to its specific and unique facts, and BSA Cal. No. 132-03-A was denied, so that the language relied upon by Owner is essentially equivalent to *dicta* and has no precedential value; and

WHEREAS, finally, with respect to the "Travelers Umbrella" case (BSA Cal. No. 152-97-A), the Board agrees with Appellant that the instant appeal is clearly distinguishable in that DOB's policy with respect to the sign at issue had been formalized in guidance documents whereas, in the instant appeal, DOB's standards were never formalized or uniformly applied even to the facts giving rise to the instant appeal; and

Therefore it is Resolved that the instant appeal, seeking a reversal of the Final Determination of the Manhattan Borough Commissioner, dated February 15, 2007, determining that the Building's expansion complies with the Sliver Law, is hereby granted.

Adopted by the Board of Standards and Appeals, September 11, 2007.

A true copy of resolution adopted by the Board of Standards and Appeals, September 11, 2007.
Corrected and Printed in Bulletin No. 38, Vol. 92.

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