81-08-A
APPLICANT – Harvey Epstein, Esq., for 514-516 East 5th Street, LLC, owner.
SUBJECT – Application April 4, 2008 – Appeal seeking to revoke permit and approvals for a vertical enlargement of an existing non- fireproof tenement building which fails to comply with the applicable provisions of the MDL regarding fire safety standards. R7-2 zoning district.
PREMISES AFFECTED – 514-516 East 6th Street, between A and Avenue B, Block 401, Lot 17, 18 & 56, Borough of Manhattan.
COMMUNITY BOARD #3M
APPEARANCES –
For Applicant: Harvey Epstein.
ACTION OF THE BOARD – Appeals granted.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice-Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez.....4
Negative:.....0
Absent: Commissioner Montanez.....1
THE RESOLUTION:[1]

WHEREAS, the instant appeal comes before the Board in response to a determination of the Manhattan Borough Commissioner, dated March 6, 2008, to uphold the approval of Alteration Permit No. 104744877 permitting the enlargement of a five-story non-fireproof tenement building; and

WHEREAS, the Final Determination reads, in pertinent part:

> "[t]he Department has determined that the applicant's proposed design upgrades the level of fire protection afforded the occupants that is at least equivalent to what would be required under the MDL. For instance, the design includes the installation of a sprinkler system throughout the building, even though the MDL would not require any sprinklers. Additionally, the Department will require hard-wired smoke detectors in all apartments in the building to replace any battery operated ones, even though there would otherwise be no obligation to do so.
>
> Further, many other upgrades that increase the level of safety, such as increasing the fire-resistive rating of the stair and entrance hall walls and the cellar ceilings by adding layers of fire-rated sheetrock, and the construction of fire passages from the back yards. Thus, the fire-safety upgrades in the proposed design maintain the spirit and intent of the MDL, given the practical difficulties and unneccesary hardships that would be caused in this particular case by the compliance with the strict letter of the MDL provisions.
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> . . . The addition of the sprinkler system and the hard-wired smoke detectors will benefit current tenants by dramatically increasing the level of fire protection afforded them.
>
> This shall be considered a Final Determination by the Department on . . . 514/516 East 6th Street, Manhattan;"

and

WHEREAS, this appeal was heard concurrently with a companion appeal under BSA Cal. No. 82-08-A, decided the date hereof, requesting a finding by the Board that the issuance of Alteration Permit No. 104744877 violated the New York State Multiple Dwelling Law and a revocation of the permit; and

WHEREAS, because the two appeals present the same issues of law and fact, in the interest of convenience, the Board heard the cases together and the record is the same for both; and

WHEREAS, a public hearing was held on this appeal on October 7, 2008, after due notice by publication in the *City Record*, and then to decision on November 25, 2008; and

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

WHEREAS, this appeal is brought by Jean Chin, a tenant of the subject premises (the "appellant"); and

WHEREAS, the appellant, the Department of Buildings ("DOB") and the owner of the subject buildings have been represented by counsel throughout this proceeding; and

WHEREAS, Community Board 3, Manhattan, recommends approval of this appeal; and

WHEREAS, Council Member Rosie Mendez provided written and oral testimony in support of this appeal; and

WHEREAS, Manhattan Borough President Scott Stringer provided testimony in support of this appeal; and

WHEREAS, State Senator Thomas K. Duane and Assembly Majority Leader Sheldon Silver also provided testimony in support of this appeal; and

WHEREAS, representatives of the Association for Neighborhood and Housing Development. The Greenwich Village Society for Historic Preservation and the Good Old Lower East Side, Inc. also provided written and oral testimony in support of this appeal; and
THE SITE

WHEREAS, the subject site consists of two five-story "old-law" non-fireproof tenement buildings located on the south side of East 6th Street, between Avenue A and Avenue B which were constructed before 1901 (described interchangeably herein as the "Buildings"

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1 Headings are utilized only in the interests of clarity and organization.

and the "subject buildings"); and
PROCEDURAL HISTORY
WHEREAS, the instant appeal concerns the enlargement of the Buildings; and
WHEREAS, on October 3, 2007, DOB issued Alteration Permit No. 104744877 (the "Permit") permitting a two-story vertical enlargement of the Buildings; and
WHEREAS, on October 26, 2007 and November 5, 2007, counsel for the appellant wrote the Manhattan Borough Commissioner requesting reconsideration of DOB's approval of the Permit based on the alleged violation of the Multiple Dwelling Law; and
WHEREAS, on March 6, 2008, the Manhattan Borough Commissioner issued the Final Determination, cited above, that forms the basis of the instant appeal; and
WHEREAS, on April 4, 2008, the appellant filed the instant appeal at the BSA; and
ISSUES PRESENTED
WHEREAS, the appellant makes the following primary arguments in support of its position that DOB should revoke the Permit for the subject buildings: (i) the Multiple Dwelling Law expressly prohibits enlargement of non-fireproof tenement buildings unless they are brought up to all applicable code requirements governing new construction; (ii) DOB lacked authorization to permit alternative safety upgrades in lieu of meeting requirements of the Multiple Dwelling Law; and
WHEREAS, these two arguments are addressed below; and
Requirements of Enlargement of Tenement Buildings
WHEREAS, the appellant contends the enlargement of the Buildings violates the fire protection measures of the Multiple Dwelling Law and therefore that the Permit should be revoked; and
WHEREAS, the appellant represents that that the Multiple Dwelling Law was enacted by the State Legislature in 1929 in part to provide fire protection to residents in New York City tenement buildings; and
WHEREAS, the appellant asserts that the enlargements of the Buildings is governed by MDL § 211, which prohibits the enlargement of any non-fireproof tenement to exceed a height of five stories; and
WHEREAS, the appellant states that MDL § 211 permits enlargements above five stories only in two circumstances: 1) a five-story old law tenement can be increased to six stories provided there is no increase in the height of the existing roof beams above curb level; and 2) any tenement can be enlarged to any height provided it meets all applicable requirements for comparable new fireproof construction under the MDL (see MDL § 3(11); and
WHEREAS, the appellant states pursuant to Local Law 76 of 1968, the City Council adopted a new building code (the "Building Code") which included egress requirements for multiple dwellings; and
WHEREAS, the appellant further states that because these provisions, as well as others in the Building Code, exceed the minimum requirements set forth in the MDL, the State Legislature amended the MDL to specifically allow the Building Code to be applied, at the option of the property owner, to alterations affecting multiple dwellings (see MDL § 3 (11) MDL)); and
WHEREAS, the appellant states that § 27-120 of the Building Code incorporates the option afforded under the MDL; newly constructed multiple dwellings, as opposed to alterations to those existing in 1968, must comply with the City's stricter Building Code requirements; and
WHEREAS, the appellant contends that the enlargement of the subject buildings comply neither with the requirements of the MDL, nor with the stricter requirements of the Building Code, concerning fireproof construction, interior exit stairs, and elevators, among other deficiencies; and
WHEREAS, as defined by the MDL, the height of the subject buildings exceed six stories (see MDL § 4 (35) and (36)); and
WHEREAS, the appellant contends that the enlargement of the subject buildings above five stories triggers a requirement that the Buildings meet the MDL requirements for fireproof construction (MDL § 3(11)); and
WHEREAS, the appellants further contend that these requirements mandate that the floors and roof be made of non-combustible materials of one and one-half hour fire resistive rating (see MDL § 4(25); and
WHEREAS, it is undisputed that the Buildings do not meet this standard; and
WHEREAS, with respect to interior exit stairs, the Appellant states that the MDL requires interior exit stairs in fireproof buildings to be enclosed in noncombustible three-hour fire-rated walls (MDL §§ 102, 148); and
WHEREAS, the appellant represents that the approved assembly for three-hour fire-rated partitions is comprised of two layers of fire-rated sheetrock on both sides of 3-5/8" metal studs; and
WHEREAS, the appellant contends that the existing stair enclosures are comprised of plaster and wood lath on wood studs which is laminated only on the stair-side with fire-rated sheetrock; and
WHEREAS, the appellant further contends that fire-retarding a single side of an interior stair is not acceptable under the MDL for a two-story multiple dwelling, much less a seven story one (see MDL § 148 (3)); and
WHEREAS, the appellant argues that that the width of the staircase in 514 East 6th Street also violates the MDL; and
WHEREAS, the MDL requires interior exit stairs to be at least 36 inches in clear width (see MDL § 231(2)) and the appellant represents that the existing

stair serving 514 East 6th Street is only 31 inches in width; and

WHEREAS, the appellant states that the MDL provides that apartment entry doors may not open directly onto an exit stair to prevent the egress stair from filling up with smoke in the event of a fire inside an apartment where the apartment entry door is left open (see MDL §148); and

WHEREAS, the appellant contends that DOB approved an enlargement of the subject buildings despite the fact that the apartment entry doors open directly onto an exit stair; and

WHEREAS, DOB states that the sprinklering of the Buildings is an effective substitute for the requirements of MDL § 148; and

WHEREAS, the appellant asserts that the sprinklering of the Buildings would be ineffective to remediate a smoke condition, and that doing so would therefore not provide an equivalent level of protection and therefore would fail to be an acceptable substitute for the statutory requirement; and .

WHEREAS, the appellant argues that at more than six stories and 60 feet in height, the subject buildings also do not comply with the MDL requirements for elevator accessibility; and

WHEREAS, under the MDL, each building must be equipped with a passenger elevator accessible to every apartment above the entrance story and an elevator is required for any building exceeding six stories (see MDL § 51(6)); and

WHEREAS, the appellant states that the subject buildings have no elevators; and

WHEREAS, DOB argues that the Appellant's claim that elevators are required because the Buildings exceed six stories and 60 feet in height is incorrect, because longstanding DOB policy applies Building Code § 27-306 for the purposes of defining height limits; and

WHEREAS, if Building Code § 27-306 were applied to the Buildings, the seventh floor penthouses would not be included within the height or number of stories and, at a resulting six stories and less than 60 feet, the elevators would not be required; and

WHEREAS, however, as an interpretation of a provision of the MDL is at issue, the MDL definitions of height and number of stories must be applied;

WHEREAS, as stated above, under the MDL, the height of the subject buildings exceeds six stories and 60 feet (see MDL § 4 (35) and (36)); therefore elevators would be required; and

WHEREAS, the appellant contends that the aforementioned non-compliances as to fireproof construction, interior exit stairs, and elevators constitute a sampling of the deficiencies in MDL compliance by the subject buildings; and

WHEREAS, it is undisputed by DOB and the owner that the MDL requires fire safety upgrades in conjunction with the enlargement of tenement buildings; and

Authorization to Vary the Application of the MDL

WHEREAS, the appellant contends that DOB lacked authority to approve the enlargement of the subject buildings because of their non-compliance with the fire safety measures required by the MDL in conjunction with such enlargements; and

WHEREAS, the DOB states that the MDL was enacted in 1929, prior to the widespread use of sprinklers and other advancements in construction materials and represents that the design for the subject buildings upgraded the level of fire protection to a level at least equivalent to the standard required by the MDL (see February 1, 2008 letter from Deputy Commissioner Fatma M. Amer, P.E., to Council Member Mendez), but

WHEREAS, in her February 1, 2008 letter, Deputy Commissioner Amer also stated that "the fire-safety upgrades in the proposed design maintain the spirit and intent of the MDL, given the practical difficulties that would be caused in this particular case by the compliance with the strict letter of the MDL provisions"; and

WHEREAS, in a submission to the Board, DOB states that strict compliance with the fire safety upgrades required by the MDL would make it virtually impossible for tenements such as the Buildings to be enlarged; and

WHEREAS, DOB represents that unless enlargement of such buildings were permitted in the manner implemented by DOB, increased fire safety measures would not be imposed, and

WHEREAS, DOB states that the fire safety upgrades which include: (i) sprinklering of the Buildings; (ii) installation of hard-wired smoke detectors in all apartments; (iii) increased fire-resistive rating of the stair and entrance hall walls and cellar ceilings; and (iv) the construction of fire passages in the rear yards (collectively, the "alternative safety measures") are an effective alternative method of fire safety improvement that increase the safety of tenement residents; and

WHEREAS, Board acknowledges that the intent of the alternative safety measures was to ensure that tenement residents were better protected against fire than would be possible absent the enlargement of the Buildings; and

WHEREAS, the appellant asserts that by approving alterations that were inconsistent with the MDL, and with the alternative framework of the Building Code, DOB was in effect granting a variance from the strict requirements of the MDL; and

WHEREAS, the appellant argues that DOB lacks authority to vary the application of the MDL; and

WHEREAS, the appellant states that DOB is required by the MDL to enforce its provisions (MDL § 303 (1)) and cannot refuse to do so or adopt new exceptions, and that Section 643 of the City Charter

additionally provides that the Department "shall enforce" the provisions of the MDL, among other statutes; and

WHEREAS, the Appellant further states that the NYC Charter provides that the Commissioner of DOB "shall have no power to allow any variance from the provisions of any law in any respect except as expressly allowed therein" (NYC Charter § 645); and

WHEREAS, the appellant contends that the term "shall" used in the above-referenced statutes is mandatory, not optional, and does not allow DOB any latitude in its enforcement of the MDL; and

WHEREAS, the appellant points out that DOB is expressly granted the power to vary MDL requirements only with respect to loft dwellings (see MDL Article 7-b); and

WHEREAS, the appellant states that MDL instead vests the Board with the power to grant relief to the "strict letter" of its requirements (MDL § 310 (2)); and

WHEREAS, the appellant concludes that, other than with respect to loft dwellings, only the Board is empowered to grant variances to the strict letter of the MDL, and that variances granted by DOB would exceed its authority under the law; and

WHEREAS, the appellant further states that permitting an alternative scheme of fire protection also amounts to an attempt to legislate by DOB, without undergoing a formal rulemaking process, and points out that when the Council adopted the Building Code, the NYS Legislature made conforming amendments to the MDL to specifically allow the City's code to be applied instead; and

WHEREAS, the Board notes that DOB has not provided statutory or legal authority supporting its authority to waive the MDL; and

WHEREAS, a submission by the owner argues that DOB has the ability to disregard the contested provisions of the MDL under its reserved police powers; and

WHEREAS, the Board disagrees that these provision allow DOB to enforce the MDL in a manner other than as prescribed, because they empower a City or town to make local laws, ordinances, resolutions or regulations concerning matters within the province of the MDL; and

WHEREAS, such a provision would not apply to the instant appeal because the alternative safety measures in question are not the subject of a local law, ordinance, resolution or regulation expressly permitting their implementation; and

WHEREAS, the Board further notes that MDL § 3 (7) expressly prohibits any local law, ordinance, rule or regulation from modifying or dispensing with any provision of the MDL; and

WHEREAS, the owner also argues that the alternative fire safety measures are not necessarily invalid, simply because they are not identical to the MDL, citing Schilhaus v. Gilroy (22 Misc. 2d 524 (Sup. Ct. 1959)), Dankner v. City of New York (cite) and Matter of Sacer Realty Corp. (73 N.Y.S. 2d 211 (Qns. Sup. Ct. 1947)) in support; and

WHEREAS, the Board notes that the afore-mentioned cases provide support for the proposition that a municipality can impose more restrictive measures to protect public health and safety and are therefore irrelevant to the question of whether DOB can adopt alternative safety measures that are not alleged to be more restrictive than the MDL; and

WHEREAS, the Board finds that MDL § 211 requires the enlargement of the subject buildings to comply with the MDL provisions governing fireproof buildings and that the alternative safety measures are inconsistent with the requirements of the MDL for fireproof buildings; and

WHEREAS, in the absence of stated authority for the approval of the alternative safety measures, the Board further finds that the Permit for the enlargement of the subject buildings was invalidly issued; and

Authorization of the Board to Grant the Appeal

WHEREAS, the owner argues that the Board does not have authority to decide this appeal, citing decisions in Cherry v. Brumbaugh (255 A.D. 880 (2d Dep't 1938)); Downey v. Vill. of Kensington (257 N.Y. 331 (1931)), and Levy v. Bd. of Stds. and Apps., 267 N.Y. 347 (1935)); and

WHEREAS, however, none of the cited cases support the owner's contention; the Cherry and Downey cases, inasmuch as they deal with issues concerning the constitutionality of zoning resolutions, are entirely inapposite to the question of the BSA's authority to hear appeals of DOB decisions and the Levy case actually supports the appellant's position that legislation is required to implement the alternative safety measures; and

WHEREAS, the Board's authority to hear the instant appeal is clearly conferred by Sections 648 and 666(6)(a) of the New York City Charter; and

WHEREAS, further, the Board concludes that it has the power to determine whether DOB was authorized to approve fire safety measures that were inconsistent with the requirements of the MDL; and

Providing Relief to the Owner

WHEREAS, the owner argues that if the law and facts dictate an approval of the instant appeal, the Board should nonetheless deny it and re-open the hearing to take evidence of the Owner's own hardship appeal; and

WHEREAS, the owner, argues that the Board should, within the context of the instant appeal, exercise its authority pursuant to City Charter § 666(7) to fashion a resolution that addresses the Owner's "practical difficulties and or unnecessary hardship" in strictly complying with the MDL; and

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WHEREAS, the Board notes that City Charter § 666(7) provides authority for it to hear an appeal concerning the application of the MDL; however, Section 1-07 of the Board's Rules of Practice and Procedure sets forth certain procedural and notification requirements necessary before the Board can act, including the filing of a formal application; and

WHEREAS, the owner has not met these requirements; and

WHEREAS, the owner states that decisions by the Board respecting applications filed as BSA Cal. Nos. 330-03-A, 132-03-A and 174-05-A provide precedent for it to seek and obtain relief in the instant appeal; and

WHEREAS, the Board disagrees that the cited resolutions provide a basis for the owner to seek and obtain relief in the instant appeal: in BSA Cal. No. 330-03-A and BSA Cal. No. 132-03-A, the Board acted on requests by applicants pursuant to Section 666 of the Charter, rather than on a request by a third party, such as the owner in the instant appeal; and in BSA Cal. No. 174-05-A, on the record presented, the Board modified a variance previously granted by DOB pursuant to Building Code § 27-107 that was within the authority of the agency; in the latter case, as with the two former cases, the Board was acting on an application before it, not in response to a request interposed by a third party seeking relief pursuant to an application filed by an unrelated party; and

WHEREAS, alternatively, the Owner also argues that if the law and facts dictate a grant of the instant appeal, that the Board has the jurisdiction to fashion relief so as to make its rule prospective only and to not revoke the Permit of the subject buildings; and

WHEREAS, the Board does not have the authority to simultaneously determine that the Permit for the enlargement of the Buildings was issued without authorization, and then to ignore that fundamental fact; and

WHEREAS, the Board finds that: (i) the proposed enlargement of the subject buildings under Alteration Permit No. 104744877 must meet the requirements of Multiple Dwelling Law for fireproof construction; (ii) the proposed enlargement of the Buildings does not comply with the requirements of the Multiple Dwelling Law for fireproof construction; and (iii) as DOB has not provided any evidence of statutory or legal authority to approve alternative safety measures, the enlargement must meet the requirement of the MDL for fire proof construction

Therefore it is Resolved, that the instant appeal, seeking a reversal of the determination of the Manhattan Borough Commissioner, dated March 6, 2008, and a revocation of Alteration Permit No. 104744877, is hereby granted; and

Adopted by the Board of Standards and Appeals, November 25, 2008.

A true copy of resolution adopted by the Board of Standards and Appeals, November 25, 2008.
Printed in Bulletin No. 46, Vol. 93.

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