

665-39-A & 107-14-A

APPLICANT – Jesse Masyr, Esq/Fox Rothschild, for City Club Realty, LLC., owner.

SUBJECT – Application May 22, 2014 – Amendment to a previously approved waiver of a non-complying exit stair; and an Appeal filed pursuant to MDL Section 310(2)(a) proposed an addition to the existing building which will require a waiver of MDL Section 26(7)pursuant to Section 310. C6.45 SPD zoning district.

PREMISES AFFECTED – 55-57 West 44th Street, between 5th Avenue and Avenue of the Americas, Block 1260, Lot 10, Borough of Manhattan.

COMMUNITY BOARD #5M

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Perlmutter, Vice-Chair Hinkson, Commissioner Ottley-Brown and Commissioner Montanez.....4
Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Department of Buildings (“DOB”), dated May 5, 2014, acting on DOB Application No. 121328198 reads, in pertinent part:

The proposed enlargement increases the degree of non-compliance of the existing inner courts, contrary to MDL Section 26(7), contrary to MDL 30; and

WHEREAS, this is an application pursuant to Multiple Dwelling Law (“MDL”) § 310, to vary court requirements to permit a nine-story enlargement to an existing transient hotel (Use Group 5), contrary to the court requirements of MDL § 26(7); in addition, this application seeks a reopening and certain amendments to BSA Cal. No. 665-39-A; and

WHEREAS, a public hearing was held on this application on November 25, 2014, after due notice by publication in *The City Record*, with a continued hearing on January 6, 2015, and then to decision on January 30, 2015; and

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

WHEREAS, the subject site is located on the north side of West 44th Street, between Fifth Avenue and Avenue of the Americas, within a C6-4.5 zoning district within the Special Midtown District; and

WHEREAS, the site is an interior lot with approximately 45 feet of frontage along West 44th Street and 4,502 sq. ft. of lot area; and

WHEREAS, the site is occupied by a nine-story commercial building (the “Building”), which was constructed in 1902 as a social club with guest rooms and is currently occupied as a hotel (Use Group 5) with an

eating and drinking establishment (Use Group 6) on the first story; the Building has approximately 32,092 sq. ft. of floor area (7.12 FAR) and 65 hotel rooms; and

WHEREAS, the site has been subject to the Board’s jurisdiction since May 31, 1939, when under BSA Cal. No. 665-39-A, the Board waived certain Building Code provisions in connection with a conversion of the first, fourth, fifth, sixth, and seventh stories and the penthouse from guest rooms to offices; the Board included the following conditions with its grant: (1) that the Building’s height would not be increased; (2) that two stairways with fireproof partitions would be provided from the roof to the street; (3) that the existing eastern rear stair would be a minimum of 2’-10” in width; and (4) that at least one fire escape had an exit in the rear yard of the adjoining property; and

WHEREAS, the Board has adopted two minor amendments to the 1939 grant; on September 26, 1939, the Board modified the grant to allow the social club use on the seventh floor; on January 30, 1940, the Board amended to grant to clarify the height of the Building; and

WHEREAS, the applicant states that, in or about 1999, the Building was converted back to predominantly hotel use; in connection with this conversion, the third story was divided into two stories, and the penthouse was enlarged and reclassified as the ninth story; and

WHEREAS, the Board notes and the applicant acknowledges that the Board’s authorization for the 1999 conversion was required but never obtained; however, DOB did authorize the conversion and issued a final certificate of occupancy for the Building on September 18, 2012; and

WHEREAS, the site includes two inner courts beginning at the second story, one along the western lot line and the other along the eastern lot line (the “Courts”); the Courts each have an area of approximately 76 sq. ft., a height of approximately 82’-0” and minimum widths that vary from 8’-0” to 10’-0”; the applicant notes that 16 existing hotel rooms rely on the Courts for light and ventilation; and

WHEREAS, the applicant proposes to enlarge the Building by nine stories, resulting in a total building height of 192’-5”, an increase in floor area from 32,092 sq. ft. (7.12 FAR) to 54,024 sq. ft. (12.0 FAR), and the addition of 61 hotel rooms; and

WHEREAS, with respect to stories two through nine, the applicant proposes to maintain the Courts at their existing dimensions; with respect to stories 10 through 18, the applicant proposes to increase the size of the Courts, from approximately 76 sq. ft. to approximately 126 sq. ft. (9’-0” by 14’-0”) on the east side of the Building and approximately 153 sq. ft. (9’-0” by 17’-0”) on the west side; and

WHEREAS, the applicant states that the 16 existing hotel rooms that currently rely on the Courts for light and

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ventilation will continue to rely on the Courts for required light and ventilation after the Building is enlarged; however, none of the 61 hotel rooms in the proposed enlargement will rely on the Courts; instead, the new rooms will receive required light and ventilation from the West 44th Street side of the Building or from the required rear yard; and

WHEREAS, the Board notes that pursuant to MDL § 4(9), transient hotels are considered Class B multiple dwellings; therefore, the proposed hotel use must comply with the relevant provisions of the MDL; and

WHEREAS, pursuant to MDL § 4(32), the Courts are considered “inner courts”; and

WHEREAS, MDL § 26(7) states that, except as otherwise provided in the Zoning Resolution, (1) an inner court shall have a minimum width of four inches for each one foot of height of such court, but in no event less than 15 feet in width at any point; and (2) the area of such inner court shall be twice the square of the required width of the court and a minimum of 350 sq. ft. but need not exceed 1,200 sq. ft.; the applicant notes that the Zoning Resolution does not provide any standards for courts that serve transient hotels; and

WHEREAS, thus, based on the existing height of the Courts (82'-0"), per MDL § 26(7), the Courts are required to have minimum widths of 27'-4" and minimum areas of 1,200 sq. ft. ($82'-0" \times 0'-4" = 27'-4"$; thus, $27'-4" \times 27'-4" \times 2 = 1,494 \text{ sq. ft.} > 1,200 \text{ sq. ft.}$); as noted above, each of the Courts has an area of approximately 76 sq. ft.; and

WHEREAS, the applicant states that the Courts in the proposed enlargement will have minimum widths of 9'-0", heights of 179'-0", and an areas of 126 sq. ft. (eastern) and 153 sq. ft. (western); thus, based on the proposed height of the Courts (179'-0"), per MDL § 26(7), the enlarged Courts are required to have minimum widths of 53'-8" and, again, minimum areas of 1,200 sq. ft. ($179'-0" \times 0'-4" = 53'-8"$; thus, $53'-8" \times 53'-8" \times 2 = 5,767 \text{ sq. ft.} > 1,200 \text{ sq. ft.}$); and

WHEREAS, to summarize, the proposed portion of the Courts, though larger in area than the existing portion, increases the existing degree of non-compliance with respect to MDL § 26(7) *vis à vis* the 16 existing hotel rooms with legally-required windows opening upon the Courts; however, no new non-compliance with respect to the enlarged portion of the Courts is created, because the proposed hotel rooms in the enlarged portion of the building do not rely on the Courts for required light and ventilation; and

WHEREAS, accordingly, the applicant requests that the Board invoke its authority under MDL § 310 to permit the proposed enlargement contrary to MDL § 26(7); 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 Building was constructed in 1902; therefore the building is subject to MDL § 310(2)(a); and

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

WHEREAS, the Board notes that MDL § 26(7) specifically relates to the minimum dimensions of courts; therefore, the Board has the power to vary or modify the subject provisions pursuant to MDL § 310(2)(a)(3); and

WHEREAS, turning to the findings under MDL § 310(2)(a), the applicant asserts that practical difficulty and unnecessary hardship would result from strict compliance with the MDL; and

WHEREAS, in support of this assertion, the applicant submitted a comparison between the proposal and the enlargement of the Building in accordance with the MDL; and

WHEREAS, the applicant asserts that owing to the narrow width of the site (approximately 45 feet), the locations and dimensions of the Courts, and the minimum dimensional requirements of MDL § 26(7) (two courts with minimum areas of 1,200 sq. ft.), an MDL-compliant enlargement would be predominantly dedicated to the inner court space and would yield narrow, inefficient floorplates that would be wholly unsuitable for hotel rooms; accordingly, the applicant's complying scenario is a nine-story enlargement that provides a rear yard above the Courts; and

WHEREAS, the applicant states that the complying enlargement would be slender, shallow, and inefficient, with nearly half of the enlargement's floorplate devoted to elevator shafts and stairwells; as such, the complying building accommodates only two or three hotel rooms per story, for a total of 26 additional hotel rooms – significantly less than the 61 additional rooms reflected in the proposal; and

WHEREAS, further, the applicant represents that the complying enlargement would cost \$471,211 per hotel room, for a total cost of \$12,251,476; in comparison, the proposal would cost \$264,909 per hotel room, for a total cost of \$16,159,421; therefore, the complying enlargement would have 57 percent fewer hotel rooms but cost only 24 percent less to develop; and

WHEREAS, the applicant also notes that it will be more expensive to finance the complying enlargement

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than the proposal, which will result in a significantly diminished return on investment; likewise, absent the requested waiver, a substantial portion of the site's development rights will not be utilized; 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 § 26(7) 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 primary intent of MDL § 26(7) is to ensure that rooms within multiple dwellings have adequate light and ventilation; and

WHEREAS, the applicant notes that only 16 of the 65 existing hotel rooms have legally-required windows opening upon the Courts and that none of the 61 proposed hotel rooms will have windows opening upon the Courts; as such, the majority of hotel guests will have legally-required windows in accordance with the MDL; and

WHEREAS, the applicant states that the proposed enlargement has been specifically designed to allow for the Courts on the new stories to exceed the sizes of the existing non-complying Courts, in order to preserve the amount of light and ventilation currently provided to the 16 rooms opening upon the Courts; specifically, the western Court in the enlargement will be 100 percent larger than the existing western Court and the eastern Court will be 80 percent larger than the existing eastern Court; and

WHEREAS, the applicant also states that in order to further mitigate the effects of the deficient sizes of the Courts, it will: (1) paint the new and existing inner courts white to increase ambient light; (2) provide mechanical ventilation (HVAC units) to the rooms relying solely on the Courts for light and ventilation; and (3) install LED lighting in the existing portion of the Courts; such lighting will operate during daylight hours and provide an average of 12 foot candles of light per story, which the applicant notes is 12 times the amount of light required for a court under the building code; and

WHEREAS, the applicant notes that the Courts align with the inner courts at adjacent hotels—the Algonquin Hotel to the west and the Iroquois Hotel to the east—which further expands the perceived sizes of the Courts and their ability to admit natural light and ventilation; and

WHEREAS, finally, the applicant contends that because the Building is used as a transient hotel, it is used by visitors to New York City, who are unlikely to spend a substantial portion of daylight hours in their rooms; and

WHEREAS, at hearing, the Board directed the

applicant to: (1) clarify the location and number of required ADA-accessible rooms in the enlarged portion of the Building; and (2) discuss why the double-height sky lobby at the 17th story cannot be used for hotel rooms; and

WHEREAS, in response, the applicant clarified the location and required number of accessible rooms within the Building and demonstrated their effect on the sizes and configurations of the Courts; and

WHEREAS, as to the sky lobby, the applicant explained that because the first story of the Building includes an eating and drinking establishment, the lobby at the first story is minimally-sized and lacks seating and other guest amenities; thus, additional lobby space is necessary for the hotel; the applicant contends that the 17th story is ideal, because at that height, the building is comparatively shallow and unsuitable for hotel rooms but sufficiently-sized and arranged for a lobby; and

WHEREAS, based on the above, the Board finds that the proposed modifications to the court requirements of MDL § 26(7) will maintain the spirit and intent of the MDL, preserve public health, safety and welfare, and ensure that substantial justice is done; and

WHEREAS, accordingly, the Board finds that the applicant has submitted adequate evidence in support of the findings required to be made under MDL § 310(2)(a) and that the requested modification of the court requirements of MDL § 26(7) is appropriate, with certain conditions set forth below; and

WHEREAS, turning to the Building Code variances authorized under BSA Cal. No. 665-39-A, the applicant seeks to amend the grant to: (1) reflect the 1999 conversion back to predominantly hotel use and the proposed enlargement; (2) eliminate the fire tower and fire escape requirements; (3) eliminate the condition regarding the maximum height of the Building; and (4) maintain the Building Code variance with respect to the eastern rear stair, which, as noted above is 2'-10", which is 0'-2" less than the minimum required for the proposed occupancy under 1968 Building Code § 27-375(b)(1); and

WHEREAS, the Board notes that it has authority to vary the requirements of the Building Code under Charter § 666(6) and that the Board may grant a modification of the Building Code pursuant to Charter § 666(7), if it finds that there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the law and that the alternative to strict compliance is within the spirit of the law, secures public safety, and does substantial justice; and

WHEREAS, the Board also notes that it has authority to permit amendments to existing grants, provided that the original findings are either not disturbed or can be made anew; and

WHEREAS, the applicant asserts that the requested amendments are appropriate because they reflect an

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overall decrease in the degree of non-compliance with the applicable provisions of the 1968 Building Code, which governed the 1999 conversion and continue to apply to the proposal; and

WHEREAS, specifically, the applicant states that the 1968 Building Code requires neither a fire tower, nor a fire escape for the Building as proposed; and

WHEREAS, in addition, the applicant contends that the sole building code variance remaining (which allows the 0'-2" deficiency in the width of the eastern rear stair) is necessary to maintain an existing condition that has existed unaltered since 1901; and

WHEREAS, the applicant asserts that the following are practical difficulties in widening the existing stair to comply with 1968 Building Code § 27-375(b)(1): (1) widening the stair would require reconfiguration of the existing hotel floorplates and would result in the loss of rooms; and (2) the existing hotel at the site would have to limit occupancy of the rooms on multiple stories during reconstruction of the deficient stair, resulting in significant lost revenue; and

WHEREAS, the Board agrees with the applicant that, as in 1939, there are practical difficulties in widening the existing stair; and

WHEREAS, the applicant contends that the proposal is within the spirit of the law; and

WHEREAS, the applicant states that minimum stair width requirements of the code exist to ensure that stairs can accommodate the anticipated occupant loads of the floors they serve; the applicant notes that the width and capacity of an exit stair is based upon the occupant load of each floor rather than the occupant load of the cumulative floors, because it is assumed that the lower floor occupants will have left the stairs when the upper floor occupants require them; and

WHEREAS, the applicant represents that the occupant loads per floor in the enlarged portion of the Building will actually be lower than those in the existing portion of the Building; thus, notwithstanding that the Building is being enlarged, there is effectively no increase in the number of persons who must use the deficient stair to exit the Building; and

WHEREAS, the applicant also notes that aside from the 0'-2" deficiency in the existing portion of the Building, the Building will fully comply with the egress requirements of the 1968 Building Code; and

WHEREAS, the Board agrees with the applicant that the proposal does not conflict with the spirit of the law; and

WHEREAS, as to public safety, the applicant states that the proposed enlargement of the Building will be accompanied by numerous fire and life safety systems upgrades, including a fire alarm system that complies with the 2014 Building Code, a new auxiliary radio communication system, and a modified and expanded smoke purge system; and

WHEREAS, the applicant adds that the mechanical, electrical, and plumbing systems in the enlargement will comply with the 2014 Building Code and that the enlargement will be non-combustible, two-hour fire-rated construction; in addition, the entire Building will be protected with sprinklers; and

WHEREAS, the Board agrees that the proposal includes sufficient improved measures and will not compromise public safety; and

WHEREAS, as to substantial justice, the applicant contends and the Board agrees that allowing the continued use of a deficient stair that was previously authorized by the Board and does not impact the safety of the occupants of the Building does substantial justice; and

Therefore it is Resolved, that Board of Standards and Appeals *modifies* the decision of the Department of Buildings, dated May 5, 2014, and *grants* this application, limited to the decision noted above, and *reopens* and *amends* BSA Cal. No. 665-39-A, having been adopted on May 31, 1939, so that as amended this portion of the resolution shall read: "to permit the enlargement and conversion of the Building to hotel use, to eliminate the fire tower and fire escape requirements, as well as the condition regarding the maximum height of the Building, and to allow continued use of the eastern rear stair at a minimum width of 2'-10", contrary to 1968 Building Code § 27-375(b)(1), *on condition* construction shall substantially conform to the plans filed with the application marked, 'Received January 23, 2015' – twenty-two sheets (22) sheets"; and *on further condition*:

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB 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 DOB 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, January 30, 2015.

**A true copy of resolution adopted by the Board of Standards and Appeals, January 30, 2015.
Printed in Bulletin Nos. 5-6, Vol. 100.**

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

